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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAMES EDWARD CLARK,

Petitioner

v.

ROBERT POULTON, UTAH STATE CORRECTIONS DEPARTMENT, DAVID JORGENSON, SALT LAKE COUNTY SHERIFF'S OFFICE

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Federal Magistrates Act permits district courts to assign magistrates certain specifically described duties, including the trial of civil matters "[u]pon the consent of the parties." 28 U.S.C. § 636(c)(1) (1988). Section 636(b)(3) of the Act permits district courts to refer to magistrates, *without* the consent of the parties, "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3) (1988). Does Section 636(b)(3) authorize a district court to refer a civil rights action to a federal magistrate for trial without the plaintiff's consent?

2. If the magistrate's conduct of a civil rights trial without the plaintiff's consent was error, was that error waived by the plaintiff's failure to object?

3. Section 636(b)(1)(C) of the Federal Magistrates Act requires a district court to make a "de novo determination" of all objections to the proposed findings and recommendations of a magistrate. 28 U.S.C. § 636(b)(1) (1988). Is that obligation satisfied when the district court did not review the transcript of proceedings before the magistrate, and there is nothing in the record to suggest that the court reviewed *any* of the evidence presented before the magistrate?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

James Edward Clark petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on petition for rehearing (App. A, *infra*, 1a-32a), is reported at 963 F.2d 1361. An earlier panel opinion (App. B, *infra*, 33a-57a), is reported at 914 F.2d 1426. The report and recommendation of the magistrate (App. D, *infra*, 61a-71a), as well as the order of the district court dismissing petitioner's complaint (App. C, *infra*, 58a-60a), are unreported.

JURISDICTION

The judgment of the court of appeals (App. G, *infra*, 75a) was entered on May 11, 1992. A timely petition for rehearing with suggestion for rehearing en banc was denied on July 1, 1992. App. F, *infra*, 73a-74a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The full text of 28 U.S.C. § 636 is included as Appendix H, *infra*, 76a-82a. The statute provides in pertinent part:

> (b)(1) Notwithstanding any provision of law to the contrary—
>
> > (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except [certain specifically designated dispositive motions]. * * *
> >
> > (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
> >
> > (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. * * *
>
> * * * *

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

* * * * *

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case * * *.

STATEMENT

1. Petitioner James Edward Clark ("Clark") commenced this action on April 25, 1986.[1] Clark invoked the district court's jurisdiction under 28 U.S.C. § 1343 and alleged that his civil rights secured by 42 U.S.C. § 1983 had been violated by two separate incidents of excessive force. The first involved the aggravation of a preexisting back injury by a parole officer prior to Clark's confinement on charges of armed robbery.[2] The second incident occurred while Clark was confined awaiting trial

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[1] Clark's original *pro se* complaint named the Salt Lake County Jail and Salt Lake County Adult Parole Division as defendants. An amended complaint later denominated the defendants as parole officer Robert Poulton, the Utah State Corrections Department (Poulton's employer), officer David Jorgenson, and the Salt Lake County Sheriff's Office (Jorgenson's employer).

[2] Clark reported to Officer Robert Poulton after learning that the police were looking for him in connection with two armed robberies. Poulton detained Clark on suspicion of the armed robberies, handcuffed him, and took him to be booked. When Clark objected to being photographed without an attorney present, Poulton allegedly pushed Clark against the wall and lifted his handcuffed arms over his head, aggravating a previous back injury. App. A, *infra*, 3a.

on the robbery charges[3]—of which he was eventually cleared.[4]

Clark's action was summarily referred to the federal magistrate "as authorized by 28 U.S.C. § 636(b)(1)(B) and the rules of this Court." App. E, *infra*, 72a. The order directed the magistrate to "manage the case, to receive all motions filed, hear oral arguments hereon [sic], to conduct evidentiary hearings when proper," and to submit a report and recommendation to the district court. *Id.* Clark did not consent to trial before the magistrate. Nevertheless, the magistrate conducted all proceedings in the case, including a one-day "trial hearing." App. D, *infra*, 62a. On September 16, 1987, the magistrate recommended that Clark's suit be dismissed for "no cause of action." *Id.* at 71a.

Clark thereafter objected *pro se* to the magistrate's report and recommendation, claiming inadequate representation by appointed counsel and challenging the facts found by the magistrate. On December 31, 1987, the district court summarily adopted the report and recommendation of the magistrate and ordered dismissal of Clark's action. App. C, *infra*, 58a-60a. At the time the court entered its order, no transcript of the hearing before the magistrate

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[3] While detained in jail, Clark was transported to court by David Jorgenson, an officer of the Salt Lake County Sheriff's Office. After leaving the courtroom, Clark asked to use the restroom and Jorgenson told him he would have to wait. Because of previous surgery, waiting was difficult and Clark later doubled over in the courthouse elevator. At that point, Jorgenson allegedly grabbed Clark's neck and pushed him into the elevator wall, again aggravating Clark's back injury. App. A, *infra*, 3a.

[4] Clark spent nine months in jail awaiting disposition of the charges against him. He was acquitted of one charge, and the second was dismissed. "During his incarceration, his truck was repossessed, and he could not attend school for which he had already paid tuition. Because of this loss of student status, he also lost the deferral of his student loan repayment." App. B, *infra*, at 36a n.1.

had been prepared.[5] Moreover, other than the conclusory statement that "[t]he court has made a de novo review of this case" (*id.* at 59a), there is nothing in the record to indicate that the district court reviewed any of the evidence presented before the magistrate.[6]

2. Clark appealed, asserting that "the magistrate had no jurisdiction because the referral was not authorized by statute," and "the district court failed to conduct a proper de novo review." App. B, *infra*, 35a. A divided panel of the Tenth Circuit agreed with the first submission and did not reach the second issue.

After a careful, section-by-section analysis of 28 U.S.C. § 636, the panel (per Judge Seymour) concluded that the reference to the magistrate was improper. The panel noted that, under Section 636(b)(1)(A), a magistrate may be designated to hear all pretrial matters except certain specifically designated dispositive motions. App. B, *infra*, 37a.[7] Under Section 636(b)(1)(B), the magistrate may be designated to hear: (1) the pretrial motions excepted in subsection (A), (2) applications by criminal defendants for posttrial relief, and (3) prisoner petitions challenging conditions of confinement. *Id.* Finally, under Section 636(c)(1), a magistrate may conduct any or all proceedings in a jury or nonjury civil matter, provided

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[5] The transcript was not available until October 3, 1988—after Clark's appeal had been filed.

[6] The record does show that the proceedings before the magistrate were magnetically recorded. There is, however, no indication whatsoever that the trial court listened to several hours of recorded testimony prior to dismissing the suit.

[7] The excepted dispositive motions include motions for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. 28 U.S.C. § 636(b)(1)(A) (1988).

that the reference to the magistrate is made "[*u*]*pon consent of the parties.*" *Id.* at 38a (*quoting* 28 U.S.C. § 636(c)(1) (1988), emphasis by the court).

According to the panel, the reference of Clark's case was not authorized by the above provisions. It was not authorized under Section 636(c)(1), because the reference was made without Clark's explicit consent. App. B, *infra*, 43a. It was not authorized by Section 636(b)(1)(B), the section invoked by the district court (App. E, *infra*, 72a), because "no dispositive motion was filed below" and Clark "was not seeking post-conviction relief." App. B, *infra*, 39a. Section 636(b)(1)(B)'s grant of authority to refer petitions challenging "conditions of confinement" was not applicable, the panel concluded, because of the narrow reach of that statutory term.[8]

In reliance on this Court's decision in *Gomez v. United States*, 490 U.S. 858 (1989), the panel then rejected the claim that the reference was proper under Section 636(b)(3), which "permits assignment to the magistrate of additional duties not inconsistent with the Constitution and federal law." App. B, *infra*, 41a. The panel concluded that, under *Gomez*, it must construe the Magistrate's Act "as a whole in light of its evolution and legislative history." *Id.* at 41a-42a. The Act carefully details in Section 636(b)(1) the matters that may be referred to a magistrate without the parties' consent. It then provides broad residual authority in Section 636(c) for a magistrate to resolve civil matters upon the parties'

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[8] The panel read "conditions of confinement" as referring to "ongoing practices" within a prison environment rather than a "'single incident that occurred in the prison.'" App. B, *infra*, 39a (*quoting Hill v. Jenkins*, 603 F.2d 1256, 1260 (7th Cir. 1979) (Swygert, J., concurring)). The panel also noted that "one of Clark's excessive force claims arises from an alleged incident occurring *before* he was jailed and involving his probation officer. This claim indisputably does *not* challenge a condition of confinement. . . ." App. B, *infra*, 41a.

express assent. Section 636(b)(3), therefore, does not validate the nonconsensual reference of Clark's civil rights action. The statute's:

> articulation of specific duties must be construed as implicitly withholding other duties not so specified, particularly when, as here, the contrary construction would in effect render the specific limitations [of the statute] a nullity.

Id. at 42a.

The panel then concluded, in accordance with what it viewed as the import of *Gomez* and the weight of divided authority in the courts of appeals, that the improper reference to the magistrate was a jurisdictional defect that was not waived by Clark's failure to object to proceedings before the magistrate. App. B, *infra*, 47a, *citing Gomez*, 490 U.S. at 865-876. In light of its conclusion that the reference to the magistrate was a non-waivable jurisdictional error, the panel did not reach Clark's objection "that the district court did not make the required de novo review of those portions of the magistrate's report to which [he] objected." *Id.* at 48a-49a n.9.

Judge Anderson dissented. According to the dissent, Clark was challenging "conditions of confinement" and, therefore, the reference was authorized under Section 636(b)(1)(B). App. B, *infra*, 51a. Alternatively, the dissent reasoned that the reference was proper under Section 636(b)(3), which was characterized as a broad "catchall" provision. *Id.* at 52a. The dissent also concluded that, even if the reference were improper, it was a non-jurisdictional error that had been waived by Clark's failure to object. *Id.* at 54a. Finally, the dissent would have rejected Clark's *de novo* review claim because it was willing to "presume" that the district court had complied with the Magistrate's Act. *Id.* at 56a.

3. Following issuance of the opinion, respondents moved for rehearing. The court of appeals postponed consider-

ation of that motion pending this Court's decision of *McCarthy v. Bronson*, 111 S. Ct. 1737 (1991). Following the decision of *McCarthy*, which held that the term "conditions of confinement" in Section 636(b)(1)(B) could not be read as narrowly as the panel below had indicated,[9] the court of appeals ordered the parties to file briefs addressing the impact of *McCarthy* and *Peretz v. United States*, 111 S. Ct. 2661 (1991). On May 11, 1992, the panel issued a second opinion. This time, Judge Anderson wrote the opinion for the panel, with Judge Seymour dissenting.

The second panel opinion began its analysis by inquiring whether the reference to the magistrate was proper under Section 636(b)(1)(B). In accordance with *McCarthy*, the panel concluded that reference of Clark's second excessive force claim—which occurred "while he was in pretrial detention"—was authorized by that section. App. A, *infra*, 7a. The panel, however, did not reach the same conclusion regarding Clark's first claim—which occurred "while he was being booked." *Id.* at 8a. Instead, the panel assumed that reference of this claim *was not* authorized by Section 636(b)(1)(B), and went on to inquire whether the reference was proper under Section 636(b)(3). *Id.*

In construing Section 636(b)(3), the panel adopted Judge Anderson's previously dissenting view that the section was a broad "catchall." App. A, *infra*, 8a. The panel reasoned that this Court's decision in *Peretz*—which upheld the *consensual* reference of a felony jury voir dire under Section 636(b)(3), *Peretz*, 111 S. Ct. at 2668-2669—supported its holding, and concluded that *Gomez*—which invalidated the *non-consensual* reference of a felony jury voir dire under Section 636(b)(3),

[9] Despite "two reasonable arguments" to the contrary, the Court in *McCarthy* concluded that the statutory phrase "conditions of confinement" encompassed more than "continuous conditions," and reached even "isolated incidents." *McCarthy*, 111 S. Ct. at 1740.

Gomez, 490 U.S. at 865-876—did not require a different result. App. A, *infra*, 10a-11a.

The panel then addressed and—despite no intervening changes in the law—reversed itself on the question whether an improper reference is a non-waivable, jurisdictional error. The panel concluded that, "assuming *arguendo* that there was no statutory authorization for the referral, the issue was waived by Clark's failure to object below." App. A, *infra*, 11a. The panel recognized that this conclusion was arguably inconsistent with this Court's pronouncements in *Gomez* and conflicted with decisions from other circuits. App. A, *infra*, 11a-14a (noting the tension with *Gomez* and announcing the panel's agreement with "those circuit court cases" that had found no jurisdictional error).

Finally, on the issue of *de novo* review, the panel acknowledged that, when objections are made to the findings of a magistrate, " 'both § 636(b)(1) and Article III of the United States Constitution require de novo review.' " App. A, *infra*, 14a (*quoting Gee v. Estes*, 829 F.2d 1005, 1008 (10th Cir. 1987)). This requires, at a minimum, that the judge " 'listen to a tape recording or read a transcript of the evidentiary hearing.' " *Id.* Nevertheless, and despite the lack of a transcript or any evidence that the district court had listened to a tape recording, the panel found no error because it was willing to "presume that the district court knew the relevant law." *Id.*

Judge Seymour dissented, calling the panel's opinion "a masterpiece of illogic." App. A, *infra*, 16a. Judge Seymour concluded that Clark's first claim did not fall within Section 636(b)(1)(B) because it arose prior to his confinement.[10] Most importantly, however, she con-

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[10] Clark's first claim of excessive force did not involve a challenge to conditions of confinement within *McCarthy* because it arose "prior to incarceration; the plaintiff simply happened to be in

cluded that the claim was not referable under Section 636(b)(3) without Clark's consent and resulted in a jurisdictional defect that was not subject to waiver. *Id.* at 16a.

According to Judge Seymour, nothing in this Court's decisions in *Gomez* or *Peretz* supported the majority's expansive reading of Section 636(b)(3). In *Gomez*, the Court concluded that Section 636(b)(3) did not authorize a magistrate to seat a felony jury without the defendant's consent "because it did not bear a sufficient relation to the specified duties of conducting civil and misdemeanor trials upon consent." App. A, *infra*, 19a-20a. By contrast, in *Peretz* the Court reached the opposite conclusion *because the defendant consented to the magistrate's actions.* Consent, according to Judge Seymour, was the "critical element" in both cases. *Id.* at 20a.

Without consent, however, Section 636(b)(3) should not be construed to "defeat a specific limitation otherwise imposed by the [Magistrate's] Act." App. A, *infra*, 20a. "Only those actions which constitute prisoner petitions challenging conditions of confinement are referable without consent under section 636(b)(1)(B)." *Id.* at 23a-24a. By contrast, "section 1983 actions that do not challenge conditions of confinement are equivalent to all other civil petitions under the Act, and are only referable under Section 636(c) with the express consent of the parties." *Id.* at 24a.

Based on the foregoing structural analysis, Judge Seymour concluded that the majority's expansion of Section 636(b)(3) to encompass the trial of a civil rights action

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prison at the time he filed suit." App. A, *infra*, 17a. Although isolated incidents of excessive force during incarceration are "considered conditions of confinements" under *McCarthy*, the "dispositive factor here" was the "*absence of confinement.*" *Id.* (empahsis in original).

that, under the express terms of the statute, is triable only by consent pursuant to Section 636(c), "render[s] the specific limitations [of the Magistrate's Act] a nullity." App. A, *infra*, 24a.

> Congress has made the specific judgment that a magistrate is not authorized to conduct civil trials without the plaintiff's express consent. Congress has also limited the magistrate's conduct of evidentiary hearings without consent to prisoner condition-of-confinement and habeas cases. A prisoner's civil rights suit for pre-confinement conduct is the same as any other citizens civil rights action. I see no principled distinction between permitting section 636(b)(3) to override the specific limitations on the reference of a prisoner's civil rights action, and permitting that section to override the limitations imposed on the reference in any other civil action for final judgment on dispositive motions, for the conduct of an entire civil trial without consent, or for the reference of felony trials. I simply do not believe Congress intended such a result.

Id. at 25a. Judge Seymour noted that the majority's contrary conclusion conflicted with decisions from several circuit courts of appeals. *Id.* at 24a-26a.

On the waiver issue, Judge Seymour concluded that "the statutorily required express consent necessary to bring this reference within the ambit of the Act * * * is a non-waivable jurisdictional prerequisite." App. A, *infra*, 28a. Judge Seymour noted that this Court had previously granted certiorari on the waiver issue, but had declined to resolve the existing split of authority. *Id.* at 26a (*citing Peretz*, 111 S. Ct. at 2671). As in her original opinion for the panel, Judge Seymour did not reach the *de novo* review question presented by Clark.

REASONS FOR GRANTING THE PETITION

The court of appeals' conclusion that Section 636(b)(3) authorizes a magistrate to try a civil rights action without the consent of the parties disregards the structure of the Magistrates Act, is inconsistent with the Court's recent pronouncements in *Gomez v. United States*, 490 U.S. 858 (1989), and *Peretz v. United States*, 111 S. Ct. 2661 (1991), conflicts with decisions from the Seventh and Eighth Circuit Courts of Appeals,[11] and raises a serious constitutional question: can federal litigants be *forced* to try their Article III claims before a non-Article III judge? The Court has previously granted certiorari on the second question presented, *i.e.*, whether an unauthorized reference to a magistrate is a waivable defect, *Peretz*, 111 S. Ct. at 2664, and the issue continues to divide the lower courts with unpredictable and incongruous results. *See* cases cited *infra* notes 17-19. Finally, the court of appeals' willingness to assume (without any record support) that the district court had conducted the statutorily and constitutionally required *de novo* review not only conflicts with decisions from at least six other circuits, *see* cases cited *infra* note 20, it also transforms a congressional mandate into a mere shibboleth.

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[11] *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1368 (7th Cir. 1990); *Roberts v. Manson*, 876 F.2d 670, 672 (8th Cir. 1989). *See also Taberer v. Armstrong World Indus., Inc.*, 954 F.2d 888 (3d Cir. 1992); *Fowler v. Jones*, 899 F.2d 1088 (11th Cir. 1990).

I. THE JUDGMENT BELOW DISREGARDS THE STRUCTURE OF SECTION 636, IS INCONSISTENT WITH THIS COURT'S DECISIONS IN *GOMEZ* AND *PERETZ*, CONFLICTS WITH DECISIONS FROM OTHER CIRCUIT COURTS, AND RAISES A SERIOUS CONSTITUTIONAL QUESTION REGARDING THE REACH OF THE MAGISTRATES ACT

As Judge Seymour explained in her original opinion for the panel and in her dissent on rehearing, the "statutory scheme for referring civil trials, or portions thereof, to a magistrate is carefully defined in the [Magistrates] Act." App. A, *infra*, 20a. Pursuant to the express provisions of that scheme, Clark's first claim of excessive force is not triable under Section 636(b)(1)(A) (because the magistrate went beyond consideration of pretrial matters), nor is it triable under Section 636(b)(1)(B) (because it is not a prisoner petition challenging conditions of confinement). Under the express wording of the statute, Clark's claim is triable before a magistrate *only* pursuant to Section 636(c), and then *only* with Clark's explicit, non-coerced consent.[12] Because that consent was never given, the reference to the magistrate was clear error.

The panel's contrary conclusion is based on an expansive reading of Section 636(b)(3). App. A, *infra*, 8a-11a. This extraordinarily broad construction of Section 636(b)(3), however, renders "the specific limitations [of the Magistrates Act] a nullity." *Id.* at 24a. It also flies in the face of Section 636(b)(3)'s legislative history, which demonstrates that the section was not intended to authorize a broad range of trial proceedings

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[12] Section 636(c) carefully safeguards voluntary consent. The statute provides that, prior to consenting to trial before the magistrate, the parties must be "advise[d] . . . that they are free to withhold consent without adverse substantive consequences." 28 U.S.C. § 636(c)(2) (Supp. 1990). Furthermore, the "[r]ules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent." *Id.*

before magistrates, but rather was drafted to expand the realm of procedural and other minor matters that could be disposed of by magistrates, thereby insuring "that *federal judges* would be free to perform their crucial adjudicatory duties without undue distraction." *United States v. Curry*, 767 F.2d 328, 330 (7th Cir. 1985) (emphasis added).[13]

The panel's reading of Section 636(b)(3), furthermore, disregards the fundamental premise of this Court's recent decisions in *Gomez* and *Peretz*. *Gomez*, for precisely the reasons outlined above, refused to find that the non-

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[13] Judge Anderson, writing for the panel on rehearing, concluded that the legislative history of Section 636(b)(3) supported his expansive interpretation. App. A, *infra*, 8a-9a. With due respect, however, Judge Anderson seriously misconstrued the legislative history. While Section 636(b)(3) was undoubtedly enacted to "enable[] the district courts to continue innovative experimentation in the use" of magistrates, Congress plainly *did not* intend these "innovations" to include the non-consensual reference of civil rights matters for trial. H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172. Indeed, the House Report which accompanied the adoption of Section 636(b)(3) specifically noted the kinds of duties that might be referred to a magistrate pursuant to Section 636(b)(3). Importantly, *none* of these suggested duties even approximate the trial of a case:

> This subsection would permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, and accept returns of jury verdicts where the trial judge is unavailable. This subsection would also enable the court to delegate some of the more administrative functions to a magistrate, such as the appointment of attorneys in criminal cases and assistance in the preparation of plans to achieve prompt disposition of cases in the court.

Id. The whole purpose of Section 636(b)(3) was to permit magistrates to attend to "various procedural steps" so that the *district courts* would be able to devote "a substantial portion of their available time . . . to the trial itself." *Id.* at 7. Section 636(b)(3), in short, was designed to free up the district courts for trial—not to shift the trials themselves to magistrates. *Hall v. Sharpe*, 812 F.2d 644, 647-49 (11th Cir. 1987); *United States v. Curry*, 767 F.2d 328, 330 (7th Cir. 1985).

consensual reference of jury voir dire in a felony case was authorized by Section 636(b)(3). *Gomez*, 490 U.S. at 865-876.[14] *Peretz* subsequently authorized the reference of voir dire pursuant to Section 636(b)(3)—but only upon the express consent of the defendant. 111 S. Ct. at 2667. Accordingly, both cases turn on the presence—or absence—of consent. *Peretz*, 111 S. Ct. at 2666 (noting that " '[a] critical limitation' " on the " 'expanded jurisdiction' " of the Magistrate's Act " 'is consent' ") (*quoting Gomez*, 490 U.S. at 870). Becase that element is entirely lacking here, the court of appeals has ignored the plain teachings of both *Peretz* and *Gomez*.

The panel's reading of Section 636(b)(3) also conflicts with decisions from the Seventh and Eighth Circuits. *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1368 (7th Cir. 1990); *Roberts v. Manson*, 876 F.2d 670, 672 (8th Cir. 1989). Indeed, in *Roberts*, the Eighth Circuit—in a factual and legal setting that cannot be distinguished from the present case—expressly held that Section 636(b)(3) does not authorize the nonconsensual reference of a civil rights trial to a magistrate.

Roberts involved a Section 1983 claim against the City of Little Rock Arkansas that was filed *pro se* while the plaintiff was incarcerated. Like the present case, however, the claim had arisen prior to the plaintiff's incarceration. The matter was referred to the magistrate for trial without the plaintiff's consent, and the magistrate entered a report and recommendation adverse to the plaintiff that was adopted by the district court. 876 F.2d at

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[14] *See also Peretz*, 111 S. Ct. at 2679 (Scalia, J., dissenting) ("*Gomez* was driven . . . by ordinary principles of statutory interpretation. By specifically authorizing magistrates to perform duties in civil and misdemeanor trials, and specifying the manner in which parties were to express their consent in those situations, the statute suggested *absence* of authority to preside over felony trials through some (unspecified) mode of consent. The canon of *ejusdem generis* keeps the 'additional duties' clause from swallowing up the rest of the statute").

671. On appeal, the defendants—like the respondents here—asserted that the reference was proper under Section 636(b)(3).[15] The Eighth Circuit expressly rejected the arguments accepted by the Tenth Circuit here.

In direct conflict with the decision below, the Eighth Circuit held that, while Section 636(b)(3) "appears on its face to be an all-inclusive authority for delegation of duties to a magistrate," the section must be read "as being limited by the accompanying provisions and the overall structure of section 636(b)." *Id.* at 672. A contrary conclusion, the court reasoned, would render the careful delineation of a magistrate's duties in Section 636 superfluous and clash with the legislative history of Section 636(b)(3), which implied "that the provision was intended to apply only to procedural and administrative matters." *Id.* (*citing* H.R. Rep. No. 1609, *supra* note 13). Accordingly, the Eighth Circuit held that Congress did not intend "to include nonconsensual evidentiary hearings as 'additional duties,' under section 636(b)(3)." *Id.* at 674. Finding that "the magistrate was without jurisdiction to hold an evidentiary hearing and adjudicate the merits of petitioner's case," the court "remand[ed] the case for a new trial before the district court." *Id.*

The Seventh Circuit has similarly held that Section 636(b)(3) does not authorize the reference of jury voir dire in civil cases without the parties' consent. *Olympia Hotels*, 908 F.2d 1363. Judge Posner, writing for the court, reasoned that "[t]he location of this provision in

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[15] The court of appeals concluded that the reference was *not* proper under other sections of the Magistrates Act. The reference was not authorized by Section 636(b)(1)(A) because the "magistrate in this case did not just hear pre-trial matters." 876 F.2d at 672. Nor was the reference authorized by Section 636(b)(1)(B) because, "[a]lthough Roberts was a prisoner at the time he filed his complaint," his claim did not challenge conditions of confinement. *Id.* The reference was also not proper under Section 636(c) because "Roberts did *not* give his consent." *Id.* at 671-72 (emphasis in original).

the middle of the statute rather than at the end makes us doubt that it was intended to be as comprehensive a catch-all as its words literally suggest." *Id.* at 1368. Moreover, Judge Posner concluded that a broad reading of Section 636(b)(3)—like that adopted by the panel below—conflicted with the overall structure of the Magistrates Act:

> Nor would there be much point to the elaborate provisions in section 636(c) for the conduct of civil trials (including jury trials) by a magistrate *with the consent of both parties* if a district judge could compel the parties, against their wishes, to submit to a magistrate's conducting vital stages in the trial, such as the voir dire of the jury.

Id. (emphasis in original).

Thus, Judge Posner concluded that "section 636 was not intended and should not be read to confer on magistrates, by means of a vague clause buried deep in the statute, the power to conduct jury voir dire without the consent of both parties." *Id.* at 1369. *See also Taberer v. Armstrong World Indus. Inc.*, 954 F.2d 888, 908 & n.29 (3d Cir. 1992) (refusing to permit Section 636(b)(3) to override provisions of the Magistrates Act and 18 U.S.C. § 3401 which require express consent of the parties); *Fowler v. Jones*, 899 F.2d 1088, 1092-93 (11th Cir. 1990) (refusing to rely on Section 636(b)(3) to override the express consent requirements of Section 636(c)).

Finally, the decision below not only ignores the structure and legislative history of the Magistrates Act, disregards pronouncements in *Gomez* and *Peretz*, and conflicts with decisions from other circuits, it also raises a serious constitutional concern: *i.e.*, whether parties can be forced to try their federal complaints before a non-Article III judge. As Judge Posner has noted:

> Article III confers the judicial power of the United States on judicial officers who have guarantees of tenure and of undiminished compensation that fed-

> eral magistrates lack. Parties may be able to consent to have their legal disputes resolved by non-Article III officers even if the dispute is within the judicial power conferred by Article III, since after all they can consent, if they want, to have the dispute resolved by a panel of private arbitrators, by a retired judge, or for that matter by a random number generator. But they cannot be *forced* to try a dispute that is subject to federal jurisdiction only by virtue of Article III before a judge who is not authorized to exercise the power conferred by that article.

Olympia Hotels Corp., 908 F.2d at 1368-69 (emphasis in original).

The decision below enables a district court to force litigants to try their disputes before a non-Article III judge. That conclusion plainly warrants the attention of the Court.

II. THE PETITION RAISES A JURISDICTIONAL QUESTION LEFT UNRESOLVED IN *PERETZ* THAT CONTINUES TO DIVIDE THE COURTS OF APPEALS

The Court has previously granted certiorari on the second question presented here: *i.e.*, whether failure to object to an improper reference under Section 636 waives the error on appeal. *Peretz*, 111 S. Ct. at 2664. The Court, however, did not reach that question in *Peretz* because the reference at issue was not erroneous. *Id.* at 2671. This case presents the Court with another opportunity to resolve the waiver question.

The question quite plainly deserves definitive resolution. The Court's opinion in *Gomez* suggests that an erroneous reference under Section 636 is a non-waivable, jurisdictional error. *Gomez*, 490 U.S. at 876 (asserting that "harmless error" analysis does not apply to an improper reference because such a reference robs the magistrate of "jurisdiction to preside"). By contrast, Justice

Scalia has written that an improper reference is not a "jurisdictional" error, although failure to object does not necessarily result in "waiver" of the claimed error. *Peretz*, 111 S. Ct. at 2678-79 (Scalia, J., dissenting).[16]

The apparent variety of views on the Court is replicated—and magnified—by numerous conflicting opinions in the courts of appeals. Some courts have held that an improper reference is non-waivable, "jurisdictional" error,[17] while other courts have concluded that an improper reference is waivable, "procedural" error.[18] At

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[16] According to Justice Scalia, "appellate courts have discretion to overlook a trial forfeiture" in certain circumstances. *Peretz*, 111 S. Ct. at 2678 (Scalia, J., dissenting) (emphasis omitted).

[17] *Taberer v. Armstrong World Industries, Inc.*, 954 F.2d 888, 908 (3d Cir. 1992) (improper reference of criminal trial to magistrate without defendant's consent results in non-waivable defect); *Jaliwala v. United States*, 945 F.2d 221, 223-24 (7th Cir. 1991) (explicit consent required before magistrate has "jurisdiction" under Section 636(c)); *Fowler v. Jones*, 899 F.2d 1088, 1092 (11th Cir. 1990) (improper reference to magistrate under Section 636(c) results in jurisdictional error, " 'That the parties proceeded to trial neither fulfilled nor removed the requirements of § (c), nor invested a non-Article III officer with authority in excess of that provided by law' ") (*quoting Hall v. Sharpe*, 812 F.2d 644, 649 (11th Cir. 1987)); *In re San Vicente Medical Partners Ltd.*, 865 F.2d 1128, 1130 (9th Cir. 1989) (unless the terms of Section 636(c) are met, "the magistrate lacked the power to deal with the matter;" court concluded that "consent is jurisdictional by terms of the statute"); *Lovelace v. Dall*, 820 F.2d 223, 226 n.3 (7th Cir. 1987) (reference to magistrate without consent results in "lack of jurisdiction" and "can not be deemed harmless error").

[18] *United States v. Arnoldt*, 947 F.2d 1120, 1123 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1666 (1992) (defendant's failure to object to magistrate's selection of the jury waives claim of improper reference); *United States v. Musacchia*, 900 F.2d 493, 503 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991) (improper reference to magistrate is waivable, non-jurisdictional error); *United States v. Wey*, 895 F.2d 429, 431 (7th Cir. 1990), *cert. denied*, 110 S. Ct. 3283 (1990) (improper reference to magistrate is not a jurisdictional error); *Archie v. Christian*, 808 F.2d 1132, 1134-35 (5th Cir. 1987) (improper reference to magistrate is "procedural" rather than "jurisdictional" error).

least one court has concluded (rather curiously) that an improper reference under Section 636(b) is a waivable, "procedural" error—although an improper reference under Section 636(c) is a non-waivable, "jurisdictional" defect.[19] This "welter of views" has "tempt[ed]" at least one circuit court "to return to ground zero and reason this out afresh." *United States v. Wey*, 895 F.2d 429, 431 (7th Cir. 1990), *cert. denied*, 110 S. Ct. 3283 (1990). That court, however, "resist[ed]" the temptation because "there are enough voices already." *Id.*

There are indeed numerous voices on the second question presented by this Petition. These voices, however, do not speak with the harmony essential to the proper construction and implementation of the Magistrates Act. The Court should grant certiorari to bring order to this discordant chorus.

III. THE DECISION BELOW, IN CONFLICT WITH JUDGMENTS FROM NUMEROUS OTHER CIRCUITS, RENDERS STATUTORILY AND CONSTITUTIONALLY MANDATED *DE NOVO* REVIEW UNENFORCEABLE

Even if there were no conflict regarding the reach of Section 636(b)(3), and even if it were established beyond peradventure that Clark had waived any objection to the magistrate's handling of his case, the Court should nevertheless grant certiorari to consider the third question presented. Section 636(b) provides that, even in those

[19] *Equal Employment Opportunity Comm'n v. West Louisiana Health Serv., Inc.*, 959 F.2d 1277, 1281-82 (5th Cir. 1992) (improper reference to magistrate under Section 636(c) is a non-waivable jurisdictional defect; by contrast, improper reference under Section 636(b)(1) constitutes waivable, "procedural" error). *See also Government of the Virgin Islands v. Williams*, 892 F.2d 305, 309-11 (3d Cir. 1989), *cert. denied*, 495 U.S. 949 (1990) (improper reference to a magistrate "is jurisdictional in nature, and thus is immunized from the general rule of waiver;" nevertheless, the court concludes that the defendant waived the improper reference to the magistrate by failing to object).

cases where the magistrate properly conducts an evidentiary hearing, the district court "*shall* make a de novo determination of those portions of the . . . proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1) (1988) (emphasis added). The decision below guts this statutory—and constitutional—mandate.

It was impossible for the district court to review the transcript in this case because the transcript had not been prepared at the time the court ruled on Clark's objections. There is also no evidence that the district court listened to any tape recording of proceedings before the district court. It is also beyond dispute that a court conducting *de novo* review "must, at a minimum, listen to a tape recording or read a transcript of the evidentiary hearing." *Gee v. Estes*, 829 F.2d 1005, 1009 (10th Cir. 1987); *see also* cases cited *infra* note 20. Nevertheless, the panel concluded that this obligation had been satisfied because it was willing to "presume that the district court knew the relevant law." App. A, *infra*, 14a.

The panel's presumption is unfounded. At least six other circuits have reversed and remanded in circumstances indistinguishable from those present here.[20] In-

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[20] *Fowler v. Jones*, 899 F.2d 1088, 1093 (11th Cir. 1990) (court "cannot presume, where no evidence exists in the record to support such a presumption," that the district court complied with the requirements of Section 636); *Jeffrey S. by Ernest S. v. State Bd. of Educ. of Georgia*, 896 F.2d 507, 512-513 (11th Cir. 1990) (vacating and remanding because trial court failed to conduct *de novo* review; "the district court is obliged to review the transcript or listen to a tape-recording of the proceedings"); *Wimmer v. Cook*, 774 F.2d 68, 76 (4th Cir. 1985) ("The district judge did not have before him a transcript of the testimony before the magistrate when he held his *de novo* review of the plaintiff's objections nor when he entered his order approving and adopting the magistrate's 'findings' and 'recommendations.' Such failure is reversible error"); *United States v. Elsoffer*, 644 F.2d 357, 358-59 (5th Cir. 1981) ("The constitutional safeguards, as established by Congress and interpreted by the courts, are such that an appellate court must be satisfied

deed, the panel opinion implicitly recognizes that its decision conflicts with established law.[21] This conflict alone is sufficient justification for review by this Court.

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that a district judge has exercised his non-delegable authority by considering the actual testimony, and not merely by reviewing the magistrate's report and recommendations"); *Hill v. Duriron Co., Inc.*, 656 F.2d 1208, 1215 (6th Cir. 1981) (court vacates and remands for *de novo* review; "[t]he court must review at least those portions of the transcript of evidence which are relevant to the particular findings that are under attack"); *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352, 355-56 (5th Cir. 1980) (court vacates and remands for *de novo* determination because "[t]here is no indication in the record that the district court reviewed the testimony of the witnesses," the transcript "was prepared two months after the district court order, and the record is silent as to any tape recording"); *Hill v. Jenkins*, 603 F.2d 1256, 1258-59 (7th Cir. 1979) (remanded for *de novo* review because "the district judge did not even have before him the transcript of the hearing"); *Orand v. United States*, 602 F.2d 207, 209 (9th Cir. 1979) (reversed and remanded for *de novo* review because there was no review of transcript or tape recording of proceedings before magistrate).

[21] The panel noted that the Eighth Circuit had "remanded in similar circumstances," but asserted that the Eighth Circuit decision "is distinguishable." App. A, *infra*, 15a (*citing Branch v. Martin*, 886 F.2d 1043 (8th Cir. 1989)). According to the panel, *Branch* established for the Eighth Circuit the "tape or transcript" rule adopted by the Tenth Circuit in *Gee v. Estes*, 829 F.2d at 1005. App. A, *infra*, 15a. Thus, reasoned the panel, while "[t]he district court in *Branch* did not have the benefit of that decision, . . . the court below was aware of *Gee*. The doubts the Eight [sic] Circuit held about the breadth of that district court's review would be unfounded here." *Id. Branch*, however, can not be set to one side on the basis of such reasoning.

Prior to its decision in *Branch*, the Eighth Circuit had previously held that a trial court conducting *de novo* review must review the transcript of proceedings before the magistrate. *Thompson v. Scurr*, 668 F.2d 999, 1004 (8th Cir. 1982), *cert. denied*, 459 U.S. 883 (1982). Therefore, if the Eighth Circuit had been willing to "presume that the district court knew the relevant law" (App. A, *infra*, 14a), there would have been no basis for the Eighth Circuit to remand in *Branch*. That court—like the panel—would have simply presumed compliance with *Thompson v. Scurr*. Because the *Branch*

But there is more. "The circuit courts have found the Magistrates Act to be consistent with Article III and due process requirements based on the statutory safeguards which require either that magistrates' dispositive decisions are subject to *de novo* review or that the parties expressly consent to trial by a magistrate." *Fowler v. Jones*, 899 F.2d 1088, 1093 (10th Cir. 1990). Clark did not consent to trial before the magistrate, and—under the panel's "presumption"—there can be no assurance that *any* Article III judge has actually reviewed the evidence underlying his case. Under the panel's "presumption," *de novo* review has become a mere tautology; it has occurred because the district court said so.

Congress plainly intended *de novo* review to be more than tautological. Moreover, Article III demands that the *de novo* review obligation of Section 636(b)(1)(C) be *enforceable* by appellate courts. A reviewing court should not "presume, where no evidence exists in the record to support such a presumption, that the Article III judge was playing an active role . . . in reviewing the magistrate's rulings . . ." *Fowler*, 899 F.2d at 1093; *accord* cases cited *supra* note 20. The circuit court's contrary conclusion merits review.

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court did not rely upon such a "presumption," but instead remanded, that case—contrary to the panel's assertion—is hardly "distinguishable." App. A, *infra*, 15a. *Branch* simply conflicts with the opinion below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 28, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 88-1177

JAMES EDWARD CLARK,
Plaintiff-Appellant,

v.

ROBERT POULTON, Utah State Corrections Department, DAVID JORGENSEN, Salt Lake County Sheriff's Office, and JOHN DOES I THROUGH X,
Defendants-Appellees.

May 11, 1992

Jeffrey A. Chase and Edwin P. Aro of Holme Roberts & Owen, Denver, Colo., for plaintiff-appellant.

David E. Yocom, Salt Lake County Atty., and Jerry G. Campbell, Deputy County Atty., Salt Lake City, Utah, for defendants-appellees, Salt Lake County Sheriff's Office and David Jorgensen.

R. Paul Van Dam, Atty. Gen., and Brent A. Burnett, Assistant Atty. Gen., Salt Lake City, Utah, for defendants-appellees, Robert Poulton and Utah State Corrections Dept.

Before HOLLOWAY, SEYMOUR, and ANDERSON, Circuit Judges.

ON PETITION FOR REHEARING

STEPHEN H. ANDERSON, Circuit Judge.

This case is before us on rehearing to consider the application of two decisions by the United States Supreme Court, *McCarthy v. Bronson*, —— U.S. ——, 111 S.Ct. 1737, 114 L.Ed.2d 194 (1991), and *Peretz v. United States*, —— U.S. ——, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991), issued since the previous opinion by the panel in this case. *Clark v. Poulton*, 914 F.2d 1426 (10th Cir. 1990). Upon review of those authorities, we grant the petition for rehearing, withdraw our previous opinion and substitute the following opinion.

James E. Clark brought this suit under 42 U.S.C. § 1983 against the Adult Parole Division of the Utah State Corrections Department, parole officer Robert Poulton, the Salt Lake County jail, and David Jorgensen, a transportation officer employed at the jail. Clark alleged that his constitutional rights were violated by two separate incidents of excessive force, and by the denial of medical treatment and of reasonable access to the mails during his pretrial detention in the jail.[1] The district court referred the case to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B). The magistrate judge held an evidentiary hearing and submitted a report recommending that Clark's claims be dismissed. The district court made a de novo review of the record, adopted the magistrate judge's report and entered judgment accordingly. Clark appeals, asserting that the magistrate judge had no jurisdiction because the referral was not authorized by statute, that in any event the district court failed to conduct a proper do novo review of the portion of the report to which Clark had objected, and that the magistrate judge erred in his application of the law. We hold that (1) the re-

[1] Clark's claims regarding the denial of medical treatment while in jail and his challenge to the jail magazine policy were consolidated with his excessive force claims.

ferral was authorized by statute; (2) in any event Clark waived his right to obect to the magistrate judge's authority by failing to object below; and (3) the district court conducted a proper review of the magistrate judge's report. We therefore affirm the dismissal of Clark's claims.

BACKGROUND

The relevant facts are undisputed. While on parole following state court convictions, Clark returned to Salt Lake City after an out-of-state visit approved by his parole officer, defendant Poulton, and learned that the police were looking for him in connection with two armed robberies. The day after Clark returned, he reported to Poulton at the Salt Lake County Parole office. Poulton then arrested him on suspicion of the armed robberies, handcuffed him, and took him down the hall to be booked. When Clark objected during the booking to being photographed without an attorney, Poulton allegedly pushed Clark against the wall and lifted his handcuffed arms over his head, aggravating a previous back injury. Following his transportation to the Salt Lake County jail, Clark purportedly did not receive requested medical treatment for his back for several weeks.

While detained in the jail, Clark and several other inmates were transported to court by defendant Jorgensen. On leaving the courtroom, Clark asked to use the restroom and Jorgensen told him he would have to wait. Because of previous surgery, waiting was apparently difficult and uncomfortable for Clark and he later doubled over in the courthouse elevator. Jorgensen allegedly grabbed Clark's neck and chest and pushed him into the elevator wall, again aggravating his back injury. Clark required physical therapy for a year after his release from jail and sought recovery of these medical expenses as part of his damages.

Clark's original complaint was filed May 12, 1986. On May 14, the district court entered an order of reference which stated:

> IT IS ORDERED that as authorized by 28 U.S.C. § 636(b)(1)(B) and the rules of this court the above entitled case is referred to the magistrate. He is directed to manage the case, to receive all motions filed, hear oral arguments hereon, to conduct evidentiary hearings when proper and make proposed findings of fact, and to submit to the undersigned judge a report and recommendation for the proper resolution of dispositive matters presented.

R.Vol. I, doc. 2. Pursuant to the order, the magistrate judge thereafter determined that Clark could proceed in forma pauperis, appointed him counsel, held scheduling and pretrial conferences, conducted an evidentiary hearing (described in the relevant documents as a trial), and issued a report recommending that Clark's claims be dismissed. Clark objected to the report, which the district court adopted in all respects, after reviewing the record.

DISCUSSION

I. *Propriety of Reference to Magistrate Judge*

Clark first asserts that the magistrate judge had no jurisdiction over his case because the referral was not authorized by the relevant statute, 28 U.S.C. § 636(b)(1)(B). Our analysis of this issue necessitates a review of the jurisdiction and authority of a federal magistrate judge under section 636.

Section 636(b)(1)(A) authorizes a judge to designate a magistrate judge to hear and determine any pretrial matter except for certain dispositive motions listed therein.[2] The district court reviews a section 636(b)(1)

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[2] Section 636(b)(1)(A) provides in pertinent part as follows:

> [A] judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion

(A) determination to determine whether the "magistrate's order is clearly erroneous or contrary to law." *Id.*

Section 636(b)(1)(B) authorizes a judge to designate a magistrate judge to conduct evidentiary hearings and submit proposed findings and recommendations in three types of proceedings: (1) those dispositive motions excepted in section 636(b)(1)(A); (2) applications for post-trial relief by criminal defendants; and (3) prisoner petitions challenging conditions of confinement.[3] If a party objects to the magistrate judge's proposed findings and recommendations, the district court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1).

Section 636(b)(2) authorizes designation of a magistrate judge to serve as a special master, either pursuant to the Federal Rules of Civil Procedure or, upon consent of the parties, without regard to Rule 53(b) of the Federal Rules of Civil Procedure.

Section 636(b)(3) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." The

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for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

28 U.S.C. § 636(b)(1)(A).

[3] Section 636(b)(1)(B) provides as follows:

[A] judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinements.

28 U.S.C. § 636(b)(1)(B).

paramaters of this "catch-all" provision are relevant to our decision in this case.

Finally, section 636(c)(1) provides that "[u]pon the consent of the parties, a . . . magistrate . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. § 636(c)(1).[4] A party may appeal a judgment entered under this section to either the district court or a court of appeals, in the same way in which a district court judgment is appealed to the court of appeals. 28 U.S.C. § 636(c)(3), (4).

At issue in this case are Clark's two claims based on excessive force, one of which occurred at the Salt Lake County Parole Office after Clark's parole officer arrested him and while he was being booked, and the other which occurred during Clark's pretrial detention in jail. As indicated, the district court referred the matter to the magistrate judge under section 636(b)(1)(B), evidently treating this case as a conditions-of-confinement case.

A. Section 636(b)(1)(B)—Conditions of Confinement:

Section 636(b)(1)(B) authorizes referral to a magistrate judge of "prisoner petitions challenging conditions

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[4] Section 636(c)(2) explains the consent requirement more fully:

> If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of the court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of the court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate shall include procedures to protect the voluntariness of the parties' consent.

28 U.S.C. § 636(c)(2).

of confinement." The propriety of such a referral therefore involves two subsidiary questions: (1) whether "conditions of confinement" encompasses only ongoing prison conditions or whether it extends to isolated instances of alleged mistreatment; and (2) whether "confinement" is present—that is, whether the challenged incident occurred while the prisoner was in "confinement." We address each question in turn.

1. *Isolated Incidents.*

The propriety of the referral to the magistrate judge of Clark's two individual and isolated claims of excessive force is controlled by *McCarthy v. Bronson*, —— U.S. ——, 111 S.Ct. 1737, 114 L.Ed.2d 194 (1991). The Supreme Court in *McCarthy* granted certiorari "to decide whether . . . authorization [under 28 U.S.C. § 636(b)(1)(B)] includes cases alleging a specific episode of unconstitutional conduct by prison administrators or encompasses only challenges to ongoing prison conditions." 111 S.Ct. at 1739. The Court concluded that "conditions of confinement" cases under section 636(b)(1)(B) include suits alleging that prison administrators acted unconstitutionally in an isolated incident or incidents. Clark's claims therefore challenged "conditions" of confinement under *McCarthy*. We turn now to the question of whether Clark was in "confinement" when each incident occurred.

2. *Confinement.*

One of the incidents in this case occurred while Clark was detained, in handcuffs, at the Salt Lake County Parole Office, shortly after he was arrested. The other took place while he was in pretrial detention. There is no doubt that Clark was in "confinement" for purposes of section 636(b)(1)(B) when he was in pretrial detention. "[T]he Due Process Clause of its own force requires that conditions of confinement satisfy certain minimal standards for pretrial detainees . . . ." *Collins v. City of Harker Heights,*

—— U.S. ——, ——, 112 S.Ct. 1061, 1070, 117 L.Ed.2d 261 (1992) (emphasis added). *See also Wimmer v. Cook*, 774 F.2d 68, 69, 74 (4th Cir.1985) (pretrial detention); *Worley v. Sharp*, 724 F.2d 862, 863 (10th Cir.1983) (per curiam) (same). Thus, referral of the excessive force claim occurring while he was in pretrial detention was authorized by section 636(b)(1)(B). We need not reach the question of whether Clark was in "confinement" while he was being booked because, as we explain *infra*, referral of both claims was proper under section 636(b)(3).

B. Section 636(b)(3)—Additional Duties:

Section 636(b)(3) permits magistrate judges to be assigned "such additional duties are are not inconsistent with the Constitution and laws of the United States." It is a " 'catchall' provision." *Garcia v. Boldin*, 691 F.2d 1172, 1178 (5th Cir.1982); *accord, e.g., King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1185 (7th Cir.1987). "Where the district court is not specifically empowered to refer a a case, it may do so under the general provision of 28 U.S.C. § 636(b)(3) . . . ." *Hall v. Vance*, 887 F.2d 1041, 1046 (10th Cir. 1989).

The legislative history of the original Federal Magistrate's Act, as well as the 1976 amendments to the Act, confirm the expansiveness of subsection (b)(3). In *Mathews v. Weber*, 423 U.S. 261, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976), the Supreme Court reviewed the legislative history of the original Act:

> The three examples § 636(b) sets out are, as the statute itself states, not exclusive. The Senate sponsor of the legislation, Senator Tydings, testified in the House hearings:
>
> "The Magistrate[s] Act specifies these three areas because they came up in our hearings and we thought they were areas in which the district courts might be able to benefit from the magistrate's services. We did not limit the courts to the areas mentioned. . . .

> We hope and think that innovative, imaginative judge who want to clean up their case load backlog will utilize the U.S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of their courts."

Id. at 267, 96 S.Ct. at 553 (quoting *Hearings on the Federal Magistrates Act Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 81 (1968). Similarly, the legislative history of the 1976 amendments states:

> This subsection [(b)(3)] enables the district courts to continue innovative experimentations in the use of this judicial officer. At the same time, *placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates.*

H.R.Rep. No. 1609, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S.Code Cong. & Admin.News 6162, 6172 (emphasis added). Most recently, the Supreme Court in *Peretz* noted the breadth of the "additional duties" section:

> The generality of the category of "additional duties" indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen. If Congress had intended strictly to limit these additional duties to functions considered in the committee hearings or debates, presumably it would have included in the statute a bill of particulars rather than a broad residuary clause.

Peretz, 111 S.Ct. at 2667; *see also Government of the Virgin Islands v. Williams*, 892 F.2d 305, 310 (3d Cir. 1989) ("The plain language of this statute clearly confers upon federal magistrates the jurisdiction to assume virtually any judicial duty assigned to them by the district courts, so long as that assignment is neither unconstitu-

tional nor a violation of some other federal law."), *cert. denied*, 495 U.S. 949, 110 S.Ct. 2211, 109 L.Ed.2d 537 (1990). The statutory authorization for referring to magistrate judges prisoner petitions challenging conditions of confinement was not meant as a bar to the referral of prisoner petitions unrelated to conditions of confinement. *See, e.g., John v. Louisiana*, 899 F.2d 1441, 1446 (5th Cir. 1990) (subsection (b)(3) authorizes post-trial referral of sanctions question even though subsection (b)(1)(A) only refers to pretrial matters).

Gomez v. United States, 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989), does not compel a contrary conclusion. There, the Court concluded that "the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial," *id.* at 872, 109 S.Ct. at 2245, because

> [w]hen a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties.

Id. at 864, 109 S.Ct. at 2241. Presiding over a felony trial bears no relation to the duties specified in the statute, but presiding over a prisoner's section 1983 action does.

Peretz supports this interpretation of *Gomez*:

> Because the specified duties that Congress authorized magistrates to perform without the consent of the parties were not comparable in importance to supervision of felony trial *voir dire* but were instead 'subsidiary matters,' we did not waver from our conclusion that a magistrate cannot conduct *voir dire* over the defendant's objection.

Peretz, 111 S.Ct. at 2667 (citation omitted). Because Clark's section 1983 action challenging his treatment

while being booked and while in pretrial detention is "comparable in importance" to a prisoner petition challenging conditions of confinement, construed in *McCarthy* to include individual instances of alleged mistreatment, we believe the referral to the magistrate judge under section 636(b)(3) was proper.[5] Furthermore, as the statute, the cases, and legislative history make clear, there is a need for district courts to have maximum flexibility in referring matters to magistrate judges to aid the district courts in dealing with the demands of heavy case loads, and for other compelling purposes of the administration of justice. The referral here advanced that settled purpose.

II. *Waiver*

Moreover, Clark made no objection to the referral to the magistrate judge. Therefore, assuming *arguendo* that there was no statutory authorization for the referral, the issue was waived by Clark's failure to object below.

While it is true that the Supreme Court in *Gomez* used the term "jurisdiction" to describe the magistrate judge's

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[5] The dissent argues that section 636(b)(3) does not confer authority to refer to a magistrate a section 1983 action that does not challenge a condition of confinement, absent the plaintiff's express consent. We disagree. *Peretz* permits referral to the magistrate of felony trial jury voir dire where the parties consent *or* where the defendant raises no objection. *See Peretz*, 111 S.Ct. at 2667-68 (Court approves the reasoning of circuit court cases holding that "the rationale of [*Gomez*] does not apply when the defendant has not objected to the magistrate's conduct of the *voir dire*."); *see also id.* at 2669 ("a defendant has no constitutional right to have an Article III judge preside at jury selection if the defendant has raised no objection to the judge's absence."). Both the presence of consent, and the lack of an objection, provide independent bases for the Court's conclusion that voir dire by a magistrate violated neither the Federal Magistrate's Act nor Article III. *See United States v. Martinez-Torres*, 944 F.2d 51 (1st Cir. 1991) (en banc); *United States v. Arnoldt*, 947 F.2d 1120, 1123 (4th Cir.1991), *cert. den.*, —— U.S. ——, 112 S.Ct. 1666, 118 L.Ed.2d 387 (1992).

authority,[6] it is also clear that the Court was *not* using the term "jurisdiction" in the sense of nonwaivable subject matter jurisdiction. *See Peretz*, 111 S.Ct. at 2678 (Scalia, J., dissenting) ("We used [the term 'jurisdiction'] in *Gomez* as a synonym for 'authority,' not in the technical sense involving subject-matter jurisdiction."); *United States v. Wey*, 895 F.2d 429, 431 (7th Cir.) ("*Gomez* used the word 'jurisdiction' in a context revealing that the court meant 'authority.'"), *cert. denied*, —— U.S. ——, 110 S.Ct. 3283, 111 L.Ed.2d 792 (1990) Indeed, although the Court in *Peretz* specifically declined to address the question of whether an unauthorized referral is a matter of jurisdiction and therefore not subject to waiver,[7] the Court's analysis suggests that it views *Gomez* as not implicating subject matter jurisdiction. "In holding that a magistrate can conduct voir dire where the parties consent, the Court [in *Peretz*] cannot have interpreted *Gomez* as implicating subject matter jurisdiction of the courts; it is well-established that litigants cannot confer jurisdiction by consent where none exists." *United States v. Judge*, 944 F.2d 523, 525 (9th Cir.1991) (citing *Insurance Corp. of Ireland v. Compagnie des Bauxites*, 456

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[6] The Court stated:

> Equally basic is a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside. Thus harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury.

Gomez, 490 U.S. at 876, 109 S.Ct. at 2248.

[7] The Supreme Court did, however, state in dicta:

> We agree with the view of the majority of Circuit Judges who have considered this issue, both before and after our decision in *Gomez*, that permitting a magistrate to conduct the *voir dire* in a felony trial when the defendant raises no objection is entirely faithful to the congressional purpose in enacting and amending the Federal Magistrates Act.

111 S.Ct. at 2671.

U.S. 694, 701-02, 102 S.Ct. 2099, 2103-04, 72 L.Ed.2d 492 (1982)).

We thus agree with those circuit court cases which have considered the issue and held that a magistrate judge's lack of statutory authority is not a jurisdictional defect, so any objection is waived if not raised. *See, e.g., United States v. Judge*, 944 F.2d 523 (9th Cir.1991); *United States v. Musacchia*, 900 F.2d 493, 503 (2nd Cir. 1990) ("the improper reference to a magistrate is a waivable defect that must be raised within the time permitted by Fed.R.Crim.P. 12(c) or it is waived under Rule 12 (b)."), *cert. denied*, —— U.S. ——, 111 SCt. 2887, 115 L.Ed.2d 1052 (1991); *United States v. Wey*, 895 F.2d 429, 431 (7th Cir.) ("We do not have a 'jurisdictional' problem . . . . We have at most a mistaken interpretation of a law designating which judicial officer shall preside over which proceedings."), *cert. denied*, —— U.S. ——, 110 S.Ct. 3283, 111 L.Ed.2d 792 (1990); *Mylett v. Jeane*, 879 F.2d 1272, 1275 (5th Cir.1989) (per curiam); *United States v. Vanwort*, 887 F.2d 375, 382-83 (2d Cir.1989) (applying *Gomez* and holding that magistrate judge's jury selection does not necessitate reversal of verdict when defendant failed to object), *cert. denied*, 495 U.S. 906, 110 S.Ct. 1927, 109 L.Ed.2d 290 (1990); *United States v. Mang Sun Wong*, 884 F.2d 1537, 1544-46 (2d Cir.1989) (order on petition for rehearing) (same), *cert. denied*, 493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1045 (1990); *see also Government of the Virgin Islands v. Williams*, 892 F.2d 305, 309-12 (3d Cir.1989) (failure to object constitutes consent to reference), *cert. denied*, 495 U.S. 949, 110 S.Ct. 2211, 109 L.Ed.2d 537 (1990); *United States v. Ford*, 824 F.2d 1430, 1438-39 (5th Cir.1987) (failure to object to magistrate's jury selection constitutes waiver of error); *cf. United States v. Rivera-Sola*, 713 F.2d 866, 874 (1st Cir.1983) (because defendant failed to object to magistrate's jury selection "we review only for plain error"). Any error below was a procedural lapse, not a jurisdic-

tional failing. *Archie v. Christian*, 808 F.2d 1132, 1134-35 (5th Cir.1987) (en banc).[8]

III. *De Novo Review*

On August 18, 1987, the magistrate judge held an evidentiary hearing, which was recorded. On September 16, he recommended that Clark's suit be dismissed. Clark objected to this recommendation, but on December 31 the district court dismissed the action. The dismissal order states that the court "made a de novo review" of the case, R. Vol. I, Tab 49, at 2, but the recording of the evidentiary hearing had not yet been transcribed.

"When objections are made to the magistrate's factual findings based on conflicting testimony or evidence, both § 636(b)(1) and Article III of the United States Constitution require de novo review." *Gee v. Estes*, 829 F.2d 1005, 1008 (10th Cir.1987) (citation omitted). "In conducting this review, the district court must, at a minimum, listen to a tape recording or read a transcript of the evidentiary hearing." *Id.* at 1009.

Gee was decided three months before the district court dismissed Clark's action. We presume that the district court knew the relevant law, *United States v. Lowden*, 905 F.2d 1448, 1449 n. 1 (10th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 206, 112 L.Ed.2d 166 (1990), so the court's statement that it conducted a de novo review must be taken to mean that it listened to the tape recording of the hearing before it dismissed Clark's suit. *See Andrews v. Deland*, 943 F.2d 1162, 1171 (10th Cir.1991) ("We will not look behind a district court's express statement

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[8] We note that a panel of our court, relying, as it must, on the previous panel opinion in *Clark*, stated in dictum that "[t]he failure to object does not waive issues concerning the magistrate's jurisdiction." *Moore v. United States*, 950 F.2d 656, 659 n. 7 (10th Cir.1991). That dictum does not bind us, however, in view of our withdrawal of the previous panel opinion in *Clark*, which *Moore* cited, and the substitution of this opinion.

that it engaged in a *de novo* review of the record."), *cert. denied*, —— U.S. ——, 112 S.Ct. 1213, 117 L.Ed.2d 451 (1992). Indeed, because of the expense and delay[9] of transcription, district courts commonly listen to a tape rather than await a transcript.

Branch v. Martin, 886 F.2d 1043 (8th Cir.1989), which remanded in similar circumstances, is distinguishable. As here, the district court adopted the magistrate judge's recommendations before the transcript of a recorded hearing was prepared. As here, the district court stated that it had conducted a de novo review, but did not say anything about listening to the tape. *Id.* at 1046; *see also Moran v. Morris*, 665 F.2d 900, 901-02 (9th Cir.1981) (court of appeals remanded for further review of tape-recorded proceedings before magistrate judge after district court adopted magistrate judge's recommendations the day they were issued). The important distinction is that *Branch* announced for the Eight Circuit the rule we adopted in *Gee*. The district court in *Branch* did not have the benefit of that decision, but the court below was aware of *Gee*. The doubts the Eight Circuit held about the breadth of that district court's review would be unfounded here.

IV. *Merits*

On the merits of Clark's claims, we agree with the decision of the district court. Accordingly, the judgment is AFFIRMED.

SEYMOUR, Circuit Judge, concurring in part and dissenting in part.

I respectfully dissent. The issue before us is not a difficult one, despite the lengthy and technical opinion which follows. This case involves the application of straight-forward principles of statutory construction to an ordinary statutory-construction problem. Under these

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[9] The transcript in this case was not prepared until almost 14 months after the hearing was held. *See* R.Supp. Vol. II.

principles, when specific and general provisions in a statute are irreconcilable, the specific language prevails over the general. In addition, a statute must not be construed to render one provision a nullity. The majority has attempted to apply Supreme Court cases in which these principles are not applicable, to this case in which they are. The result is a masterpiece of illogic, which unfortunately requires a detailed and complex response.

I agree with the majority that Clark's claim based on the incident occurring while he was in pretrial detention is a challenge to a condition of confinement in light of *McCarthy v. Bronson*, —— U.S. ——, 111 S.Ct. 1737, 114 L.Ed.2d 194 (1991). In my judgment, however, the claim based on the booking incident does not fall within the statutory language of section 636(b)(1)(B) as construed in *McCarthy*, and referral of that claim is therefore not authorized by that section. Finally, I cannot agree that referral of this prisoner's civil rights claim is authorized by section 636(b)(3), or that an unauthorized referral is a nonjurisdictional defect subject to waiver. Because a prisoner's suit for pre-confinement violations of his civil rights is the same as any other plaintiff's civil action, the logical extension of the majority's reading of section 636(b)(3) would permit a district court to refer to a magistrate the entire civil trial of any plaintiff, without consent, so long as the district court retained de novo review as specified by section 636(b)(1)(C). Congress did not intend such a result. I therefor respectfully dissent.

I.

The booking incident occurred during Clark's arrest by his parole officer at the county parole office, before he was confined at the county jail. Clark contends that when he objected to being photographed without an attorney, the parole officer pushed him against the wall and lifted his handcuffed arms over his head, aggravating a prior back injury. I find no support in *McCarthy* for concluding that this claim challenges a condition of confinement.

The Court in *McCarthy* rested its decision on two policy grounds: the benefits of referring a broad range of cases, and the difficulty of distinguishing between isolated incidents and ongoing practices with respect to whether a claim involves a condition of confinement. 111 S.Ct. at 1742. The focus for assessing those policy considerations was whether an isolated episode of unconstitutional conduct by prison administrators during incarceration constituted a condition of confinement. In this case, we consider a claim of excessive force *incident to arrest* and prior to incarceration; the plaintiff simply happened to be in prison at the time he filed suit. Although under *McCarthy* isolated incidents are now considered conditions of confinement, the *absence of confinement* is the dispositive factor here. The policy concern arising from the difficulty in distinguishing between isolated incidents and ongoing practices in prison is thus not at issue.

Moreover, to construe "confinement" so broadly as to include the facts at issue here would render that term virtually meaningless. *See Natural Resources Defense Council, Inc. v. United States Envtl. Protection Agency*, 822 F.2d 104, 113 (D.C.Cir.1987) ("It would be illegitimate for the judiciary, in pursuit of some overriding Congressional goal . . ., to tear asunder a specific provision which Congress saw fit to enact."). The district court's referral of this claim to the magistrate was not authorized under section 636(b)(1)(B).

II.

I cannot agree with the majority that referral of this claim was nonetheless proper under section 636(b)(3). In my view, this conclusion is not compelled by *Peretz v. United States*, —— U.S. ——, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991). To the contrary, I believe *Peretz* is distinguishable in critical respects. Allowing section 636(b)(3) to override the specific limitations set out in sections 636(b)(1)(B) and 636(c)(1) under the circumstances here renders those provisions a nullity. In so do-

ing, the majority violates controlling rules of statutory construction recognized and applied by the Supreme Court in ascertaining whether a referral is authorized by section 636(b)(3).

The Court in *Peretz* resolved an issue left open in *Gomez v. United States*, 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989). In *Gomez*, the Court addressed the propriety of designating a magistrate to select a jury in a criminal case over the defendant's objection. The issue there was whether this referral was authorized under Section 636(b)(3), which provides that a "magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." The Court concluded that presiding over jury selection in a felony case without the defendant's consent is not among those additional duties. 490 U.S. at 871-76, 109 S.Ct. at 2245-48.

In *Peretz*, the Court considered whether the defendant's express consent warrants a different result, and broke the inquiry down into three questions:

> "1. Does 28 U.S.C. § 636 permit a magistrate to conduct the voir dire in a felony trial if the defendant consents?
>
> "2. If 28 U.S.C. § 636 permits a magistrate to conduct a felony trial voir dire provided that the defendant consents, is the statute consistent with Article III?
>
> "3. If the magistrate's supervision of the voir dire in petitioner's trial was error, did the conduct of petitioner and his attorney constitute a waiver of the right to raise this error on appeal?"

11 S.Ct. at 2664 (quoting the grant of petition for certiorari, —— U.S. ——, 111 S.Ct. 781, 112 L.Ed.2d 844 (1991)). The Court held that "the Act's 'additional duties clause permits a magistrate to supervise jury selection in a felony trial provided the parties consent." *Id.*,

111 S.Ct. at 2667. The Court then moved to the second question set out above and concluded that such a delegation was not constitutionally infirm. *Id.* at 2669. Finally, the Court observed that its resolution of the statutory and constitutional questions made discussion of the waiver question unnecessary.

In view of the critical distinction between the referral at issue in *Peretz* and the one in this case, I am persuaded that the analysis of the section 636(b)(3) authorization in *Peretz* does not affect the analysis of this issue here. As I discuss below, the Act carefully delineates precisely what types of civil matters may be conducted by a magistrate, and under what conditions. Clark's civil action is governed by these sections of the Act. In contrast, neither the text of the statute nor its legislative history mentions a magistrate's conduct of jury voir dire in a felony case. *Peretz*, 111 S.Ct. at 2666-67. Consequently, the Court in *Gomez* and *Peretz* was required to determine whether referral with and without consent was authorized by section 636(b)(3) under the principle that "[w]hen a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties." *Id.* at 2666 & n. 7 (quoting *Gomez*, 490 U.S. at 864, 109 S.Ct. at 2241). The Court had to determine the conditions for referral of felony voir dire by analogizing that function to other functions specified by the Act.

Under this principle, the Court in *Gomez* concluded that magistrate voir dire *without consent* was *not* an additional duty authorized by section 636(b)(3). The Court pointed out that the Act expressly grants magistrates the authority to conduct jury trials of civil and criminal misdemeanor cases only with consent. 490 U.S. at 870-71, 109 S.Ct. at 2244-45. Seating a jury without consent was held impermissible because it did not bear

a sufficient relation to the specified duties of conducting civil and misdemeanor trials upon consent. In *Peretz*, the Court reached a contrary conclusion with respect to magistrate jury selection *with consent*, holding that this function was analogous to specified trial functions performed with consent. In both cases, because jury voir dire was not mentioned in the Act or the legislative history, the Court had to look to comparable specified duties; consent was the critical element in those duties. "[T]hose specified duties that were comparable to jury selection in a felony trial could be performed only with the consent of the litigants." *Peretz*, 111 S.Ct. at 2666.

The Court has indicated that a different analysis is applicable when, as here, a referral under the "additional duties" clause would defeat a specific limitation otherwise imposed by the Act.

> "The district court retains the power to assign to magistrates unspecified 'additional duties,' subject only to conditions or review that the court may choose to impose. By a literal reading this additional duties clause would permit magistrates to conduct felony trials. *But the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial.*"

Gomez, 490 U.S. at 871-72, 109 S.Ct. at 2245 (emphasis added). Under this principle, a "carefully defined grant of authority" in the Act cannot be overridden by invoking section 636(b)(3) to validate the referral of an otherwise unauthorized matter.

The statutory scheme for referring civil trials, or portions thereof, to a magistrate is carefully defined in the Act. Under section 636(b)(1)(A), a judge may designate a magistrate to hear and determine all pretrial matters except those dispositive motions specifically listed in that section. Pretrial dispositions under this section

are applicable to the district judge, who reviews the magistrate's order to determine whether it is clearly erroneous or contrary to law.[1] In other words, as to section 636(b)(1)(A) determinations by the magistrate, the district court conducts a limited review similar to an appellate court.

Under section 636(b)(1)(B), a magistrate may be designated to conduct evidentiary hearings and submit reports and recommendations on listed dispositive motions, prisoner habeas petitions, and prisoner petitions challenging conditions of confinement.[2] Section 636(b)(1)(C) provides that the district court must "make a *de novo determination* of those portions of the report or specified findings or recommendations to which objection is made." (Emphasis added). Referrals under either section 636(b)(1)(A) or (b)(1)(B) may be made without consent. Clearly, dispositive pretrial motions and the

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[1] This subsection provides in full:

"A judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dimiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A Judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law."

28 U.S.C. § 636(b)(1)(A).

[2] This subsection provides in full:

"A judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement."

28 U.S.C. § 636(b)(1)(B).

prisoner petitions described in section 636(b)(1)(B) could not be referred to a magistrate under the "additional duties" provision of section 636(b)(3) with the purpose of subjecting them to the more limited district court review specified for pretrial motions in section 636(b)(1)(A).

An analogous point was examined in *Taberer v. Armstrong World Indus., Inc.*, 954 F.2d 888 (3d Cir.1992), where the court described the significant difference between an initial finding of contempt by the district court as opposed to review de novo under section 636(b)(1)(C) of a magistrate's finding of contempt.

> "Whereas section 636(b)(1)(C) requires the district judge to make a de novo *determination*, section 636(e) requires the district judge to conduct a de novo *hearing*. In *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980), the Supreme Court distinguished a de novo determination from a de novo hearing. A de novo determination requires the district judge to 'consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate.' H.R.Rep. No. 94-1609, 94th Cong.2d Sess. 3 in 1976 U.S. Code Cong. & Admin.News 6163 (quoted in *Raddatz*, 447 U.S. at 675, 100 S.Ct. at 2412). In contrast, a de novo hearing entails a new proceeding at which the decision is based solely on the evidence freshly presented at the new proceeding. *See Raddatz*, 447 U.S. at 673-76, 100 S.Ct. at 2411-12. . . . In other words, when making a de novo determination, the district court reviews the record before the magistrate judge, but owes no deference to the magistrate judge's findings and conclusions. When holding a de novo hearing, however, the district court acts as a trial court."

Id. at 904. Similarly, when a matter is referred to a magistrate under section 636(b)(3), the initial trial is

held before the magistrate, who assesses the credibility of the witnesses and makes findings of facts. Although the district court in the instant case made "a de novo determination," as the court in *Taberer* recognizes, such a determination falls short of an actual hearing before the district court where that court would have made its own credibility assessment.

Finally, section 636(c)(1) provides that a magistrate "[*u*]*pon consent of the parties* . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. § 636(c)(1) (emphasis added). Section 636(c)(2) sets out specific requirements for obtaining consent:

> "If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, *notify the parties of their right to consent* to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of the court. Thereafter, *neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent* to reference of any civil matter to a magistrate. *Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.*"

28 U.S.C. § 636(c)(2) (emphasis added). Referral without such express consent is unauthorized. In light of section 636(c)(1), it is readily apparent that the "additional duties" provision of section 636(b)(3) does not authorizes a district court to refer an entire civil trial to a magistrate, without the parties' consent, for final disposition.

As I have outlined above, the power to refer a section 1983 action to a magistrate is specifically circumscribed by two provisions of the Act. Only those actions which

constitute prisoner petitions challenging conditions of confinement are referable without consent under section 636 (b)(1)(B). Prisoner section 1983 actions that do not challenge conditions of confinement are equivalent to all other civil petitions under the Act, and are only referable under section 636(c) with the express consent of the parties. Under the canon of construction the Court has indicated is applicable here, *see Gomez*, 490 U.S. at 871-72, 109 S.Ct. at 2245-46, " 'legislative affirmative description' implies denial of the non-described powers." [3] *Continental Casualty Co. v. United States*, 314 U.S. 527, 533, 62 S.Ct. 393, 396, 86 L.Ed. 426 (1942); *see also United States Marshals Serv. v. Means*, 741 F.2d 1053, 1056 (8th Cir.1984) (en banc); *Marshall v. Gibson's Prods., Inc.*, 584 F.2d 668, 675 (5th Cir.1978); 2A N. Singer, *Sutherland Statutory Construction* § 47.23 (Sands 4th ed. 1984 rev.).

The articulation of specific duties must be construed as implicitly withholding other duties not so specified. particularly when, as here, the contrary construction would in effect render the specific limitations a nullity. As the court in *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1368 (7th Cir.1990), pointed out, there would not "be much point to the elaborate provisions in section 636(c) for the conduct of civil trials . . . by a magistrate *with the consent of both parties* if a district judge could compel the parties, against their wishes, to submit to a magistrate's conducting vital stages

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[3] I note the view of Justice Scalia that

> "*Gomez* was driven not primarily by the constitutional problems associated with forcing a litigant to adjudicate his federal claim before a magistrate, but by ordinary principles of statutory interpretation. By specifically authorizing magistrates to perform duties in civil and misdemeanor trials, and specifiying the manner in which parties were to express their consent in those situations, the statute suggested *absence* of authority to preside over felony trials through some (unspecified) mode of consent. The canon of *ejusdem generis* keeps the 'additional duties' clause from swallowing up the rest of the statute."

Peretz v. United States, 111 S.Ct. 2661, 2679 (Scalia, J., dissenting).

in the trial." *See also Roberts v. Manson*, 876 F.2d 670, 672 (8th Cir.1989) (section 636(b)(3) "limited by the accompanying provisions and the overall structure of section 636(b)"); *cf. Natural Resources Defense Council*, 822 F.2d at 113 ("To read out of a statutory provision a clause setting forth a specific condition or trigger to the provision's applicability is, we should have thought, an entirely unacceptable method of construing statutes."). Consequently, section 636(b)(3) cannot be construed as authority for referring to a magistrate a section 1983 action that does not challenge a condition of confinement, absent the plaintiff's express consent.

I find significant support for this conclusion in *Taberer*, 954 F.2d at 901-08. In that case, which was decided after *Peretz*, the court declined to rely on section 636(b)(3) to uphold a referral otherwise contrary to the Act. In so doing, the court implicitly recognized the critical distinction between a referral under section 636(b)(3) that would defeat express limitations otherwise imposed by the Act, and a referral that would not. *See id.* at 908 n.29. This distinction is one that the majority has wholly failed to address. *See* op. at 1366 n.6.

Congress has made the specific judgment that a magistrate is not authorized to conduct civil trials without the plaintiff's express consent. Congress has also limited the magistrate's conduct of evidentiary hearings without consent to prisoner condition-of-confinement and habeas cases. A prisoner's civil rights suit for pre-confinement conduct is the same as any other citizens civil rights action. I see no principled distinction between permitting section 636(b)(3) to override the specific limitations on the reference of a prisoner's civil rights action, and permitting that section to override the limitations imposed on the reference in any other civil action for final judgment on dispositive motions, for the conduct of an entire civil trial without consent, or for the reference of felony trials. I simply do not believe Congress intended such a result. *See*

Taberer, 954 F.2d at 908; *Fowler v. Jones*, 899 F.2d 1088, 1092 (11th Cir.1990) (express consent required for magistrate jury trial of prisoner's free exercise challenge under section 1983); *accord Olympia Hotels Corp.*, 908 F.2d at 1368-69; *Roberts*, 876 F.2d at 673. Accordingly, I would hold that the referral of Clark's booking incident claim was not authorized under any section of the Act.

III.

The Court in *Peretz* concluded that the referral at issue there was authorized under the Act and created no Article III constitutional problems. Therefore, the Court found it "unnecessary to discuss the third question that we asked the parties to brief and argue;" 111 S.Ct. at 2671, namely whether "the conduct of petitioner and his attorney [in expressing consenting to the reference] constitute a waiver of the right to raise this [issue] on appeal," *id.* at 2664. After stating that it need not discuss the waiver issue, the Court made the following somewhat opaque observations:

> "We note, however, that the Solicitor General conceded that it was error to make the reference to the Magistrate in this case and relied entirely on the argument that the error was waived. Although that concession deprived us of the benefit of an adversary presentation, it of course does not prevent us from adopting the legal analysis of those Courts of Appeals that share our interpretation of the statute as construed in *Gomez*."

Id. at 2671. In other words, while the Solicitor General's concession that the reference was error deprived the Court of an adversarial presentation on the issues it *had* decided, *i.e.*, the construction of the Act and the constitutionality of that construction, the Court could nonetheless reject that concession and decide these issues by adopting the legal analysis of courts whose views were contrary to the Solicitor General's. The Court then specifically stated its agreement

> "with the view of the majority of Circuit Judges who have considered this issue, both before and after our decision in *Gomez*, that permitting a magistrate to conduct the voir dire in a felony trial when the defendant raises no objection is entirely faithful to the congressional purpose in enacting and amending the Federal Magistrates Act."

Id. The quote simply cannot logically be read, as the majority reads it, as dicta on the issue the Court specifically stated it was not deciding: *i.e.*, whether an *unauthorized* referral is a matter subject to waiver. *See* op. at 1367 & n. 8. When read in conjunction with the Court's immediately prior comments on the lack of an adversary presentation of the issues it did reach and its reference to legislative purposes, the Court's statement that *legislative intent* is not undermined by permitting magistrate voir dire when the defendant "raises no objection" does no more than bolster its resolution of the issues of statutory construction and constitutionality it had actually decided. Indeed, the Court's statement plainly implies that legislative intent *would* be undermined by relying on lack of objection when the legislature has expressed its intent to require explicit consent.

Moreover, in light of the significant difference between the reference at issue here and that in *Gomez* and *Peretz*, which I have set out in Part II of my dissent, I do not find the cases upon which the majority relies persuasive on the issue of waiver. *See* op. at 1367-1368. With the exception of the Fifth Circuit cases of *Mylett v. Jeane*, 879 F.2d 1272 (5th Cir.1989) (per curiam), and *Archie v. Christian*, 808 F.2d 1132 (5th Cir. 1987) (en banc), these cases all address referring jury voir dire in a *criminal* case. Such a reference is not addressed in either the Magistrates Act or its legislative history. In those cases, the issue of consent and/or failure to object is relevant to the propriety of referring criminal jury voir dire because it is critical to whether such referral is authorized under

section 636(b)(3) and to whether it is constitutional, not because it is an express requirement of such a reference.

Here, to the contrary, the Act specifically addresses the referral of prisoner petitions, authorizing under section 636(b)(1)(B) the reference without consent of only those petitions challenging conditions of confinement. All other references of this nature require express consent under section 636(c)(1). The claim referred here is not based on a condition of confinement authorized by section 636(b)(1)(B), cannot be viewed as an additional duty authorized by section 636(b)(3), and lacks the express consent required by section 636(c)(1). The issue is thus whether the statutorily required express consent necessary to bring this reference within the ambit of the Act, as I construe it, is a non-waivable jurisdictional prerequisite.

The majority of circuits which considered the issue prior the *Gomez* and *Peretz* decisions concluded that an improper reference is a matter of jurisdiction and therefore not subject to waiver or harmless-error analysis. In *Houghton v. Osborne*, 834 F.2d 745 (9th Cir.1987), for example, the Ninth Circuit considered facts closely analogous to those before us. There, the district court had referred a prisoner's civil rights action to a magistrate who held an evidentiary hearing on the merits of the claim and filed proposed findings and recommendations that were adopted by the district court. On appeal, the court held sua sponte that the prisoner's claim did not challenge a condition of confinement, and that the district court therefore " 'lacked the jurisdiction to refer this matter to the magistrate to conduct an evidentiary hearing on the merits of Houghton's 1983 action.' " *Id.* at 750. Similarly, in *Hall v. Sharpe*, 812 F.2d 644 (11th Cir.1987), the district court purported to refer a prisoner's civil rights suit to a magistrate under sections 636(b)(1) and (b)(3) for a trial before an advisory jury. The magistrate issued a report recommending acceptance of the jury verdict, which the district court adopted in entering final judgment

against the plaintiff. On appeal, the Eleventh Circuit concluded that "the district court's referral of this case was not authorized by any provision of the Magistrate's Act, 28 U.S.C. § 636, and thus the magistrate was without jurisdiction to conduct the trial." *Id.* at 646; *see also Fowler v. Jones*, 899 F.2d at 1092 (following *Hall*); *Jaliwala v. United States*, 945 F.2d 221, 223-24 (7th Cir. 1991) (explicit consent required for magistrate to have jurisdiction to enter final judgment under section 636 (c)); *In re San Vicente Medical Partners Ltd.*, 865 F.2d 1128 (9th Cir.1989) (same); *Lovelace v. Dall*, 820 F.2d 223 (7th Cir.1987) (per curiam) (same); *Frank v. Arnold (In re Morrissey)*, 717 F.2d 100 (3d Cir.1983) (magistrate had no jurisdiction to hear appeal from bankruptcy court order notwithstanding parties' express consent); *Taylor v. Oxford*, 575 F.2d 152 (7th Cir.1978) (magistrate had no jurisdiction over motion to dismiss for failure to state claim referred under section 636(b)(3) for final disposition pursuant to parties' stipulation and local rule); *but see Archie*, 808 F.2d at 1134-35 (improper reference under sections 636(b)(1)(B) and (b)(3) matter of procedure rather than jurisdiction).

In holding that an unauthorized referral is not a jurisdictional defect, the majority relies on several cases decided after *Gomez* that concern the failure to object to *criminal* jury voir dire before a magistrate. The majority thus persists in failing to recognize the dispositive distinction between invoking section 636(b)(3) to authorize a referral not otherwise addressed in the Act, and relying on that section to legitimate a referral that defeats otherwise expressly applicable limitations. Because the opinions which the majority cites do not address the issue before us, *i.e.*, whether violations of express statutory restrictions create nonwaivable jurisdictional defects, those cases do not support the majority's position. To the contrary, the only cases I have discovered decided after *Gomez* and *Peretz* that deal with the issue of the waiver of express conditions have refused to find such limitations waivable.

See Taberer, 954 F.2d at 907-08 & n. 29; *Jaliwala*, 945 F.2d at 223-24.

Taberer makes the very distinction that has eluded the majority here by expressly distinguishing that court's opinion in *Government of the Virgin Islands v. Williams*, 892 F.2d 305 (3d Cir.1989), *cert. denied*, 495 U.S. 949, 110 S.Ct. 2211, 109 L.Ed.2d 537 (1990), a case upon which the majority mistakenly relies. The facts in *Taberer* are analogous to those here. The provision of the Magistrate's Act at issue was section 636(e), which addresses the procedures dealing with possibly contemptuous acts in a proceeding before a magistrate. The magistrate is authorized to certify the facts to the district court and issue on order requiring the party to appear before that court. The power to take evidence and determine punishment, however, is committed only to the district court.

In *Taberer*, the magistrate held an evidentiary hearing, found contempt, and then referred the matter to the district court, which treated the magistrate's decision as a proposed finding and recommendation pursuant to section 636(b)(1)(B). The court of appeals held that this procedure was not authorized by section 636(e), nor was it otherwise authorized by 18 U.S.C. § 3401(b), which provides that magistrates may conduct misdemeanor trials only with the defendant's specific, written consent. In so doing, the court refused to find a waiver of the consent requirement arising from the defendant's appearance without objection at the evidentiary hearing before the magistrate.

> "Although failure to raise an objection in the first instance ordinarily waives the right to raise the matter on appeal, Congress has specified that criminal defendants must give their express, written consent to trial before a magistrate judge. *Therefore, cases inferring waiver of rights from a criminal defendant's failure to object do not apply here.* To hold that a

> criminal defendant may waive the Act's consent requirement implicitly is to ignore Congress's insistence upon explicit, written consent."

Taberer, 954 F.2d at 908 (emphasis added). Accordingly the court held that in proceeding without the defendant's consent, "the magistrate judge exceeded his authority undeer the Federal Magistrates Act," *id.*, and cited *In re Morrissey*, 717 F.2d 100, 103 (3d Cir.1983) as authority for "treating improper reference to [a] magistrate judge as a jurisdictional defect to be noticed by [the] court on its own motion," *Taberer*, 954 F.2d at 908 n. 29. Similarly, the court in *Jaliwala*, 945 F.2d 221, rather than following its opinion in *United States v. Wey*, 895 F.2d 429 (7th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 3283, 111 L.Ed.2d 792 (1990), upon which the majority also mistakenly relies, refused to infer consent to proceed before a magistrate under section 636(c)(1) from the conduct of the parties. " 'We see no virtue in "permit[ting] our jurisdiction to depend on inferences where both the statute and common sense call for precision." ' " *Jaliwala*, 945 F.2d at 224 (quoting *Silberstein v. Silberstein*, 859 F.2d 40, 42 (7th Cir.1988)).

Contrary to the above cases, the majority fails to perceive that while the limitations in the Magistrates Act do restrict a magistrate's authority to act in a case properly before the district court the Act also restricts the district court's power to refer a matter to a magistrate. Congressionally imposed limits on the exercise of judicial power other than the delineation of subject matter jurisdiction are nonetheless jurisdictional. *See Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330, 58 S.Ct. 578, 581, 82 L.Ed. 872 (1938); 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3526 at 227-28 (2d ed. 1984).

> "[T]he jurisdiction of a magistrate to decide a case is not based solely on the consent of the parties, but derives from a proper designation by the district court. Because district court jurisdiction is statutory,

> its ability to make a proper designation of, and thereby to confer jurisdiction on, a magistrate is also a creature of statute."

In re Morrissey, 717 F.2d at 102. I simply cannot accept an analysis under which parties by their conduct may extend the jurisdiction of both the magistrate and the district court beyond that established by Congress.

Accordingly, I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 88-1177

JAMES EDWARD CLARK,
Plaintiff-Appellant,

v.

ROBERT POULTON, Utah State Corrections Department, DAVID JORGENSON, Salt Lake County Sheriff's Office, and JOHN DOES I THROUGH X,
Defendants-Appellees.

Sept. 21, 1990

Janice M. Church, Holme Roberts & Owen (Jeffrey A. Chase, with her on the brief), Denver, Colo., for plaintiff-appellant.

Jerry G. Campbell, Deputy County Atty. (David E. Yocom, Salt Lake County Atty., with him on the brief), Salt Lake City, Utah, for Salt Lake County defendants-appellees.

Brent A. Burnett, Asst. Atty. Gen. (R. Paul Van Dam, Atty. Gen., David L. Wilkinson, Atty. Gen., Stephen J. Sorenson, Asst. Atty. Gen., and William F. Bannon, Asst. Atty. Gen., with him on the brief), Salt Lake City, Utah, for defendants-appellees Robert Poulton and Utah State Corrections Dept.

Before HOLLOWAY, SEYMOUR and ANDERSON, Circuit Judges.

SEYMOUR, Circuit Judge.

James E. Clark brought this suit under 42 U.S.C. § 1983 (1982) against the Adult Parole Division of the Utah State Corrections Department, parole officer Robert Poulton, the Salt Lake County jail, and David Jorgenson, a transporation officer employed at the jail. Clark alleged that his constitutional rights were violated by two separate incidents of excessive force, and by the denial of medical treatment and of reasonable access to the mails during his pretrial detention in the jail. The district court referred the case to a magistrate pursuant to 28 U.S.C. § 636(b)(1)(B) (1988). The magistrate held an evidentiary hearing and submitted a report recommending that Clark's claims be dismissed. The district court adopted this report and entered judgment accordingly. Clark appeals, asserting that the magistrate had no jurisdiction because the referral was not authorized by statute, that in any event the district court failed to conduct a proper de novo review of the portion of the report to which Clark had objected, and that the magistrate erred in his application of the law. We conclude that the magistrate was without jurisdiction, and we therefore reverse.

I.

BACKGROUND

The relevant facts are briefly as follows. While on parole following state court convictions, Clark returned to Salt Lake City after an out-of-state visit approved by his parole officer, Poulton, and learned that the police were looking for him in connection with two armed robberies. The day after Clark returned, he reported to Poulton at the Salt Lake County Parole office. Poulton arrested him on suspicion of the armed robberies, hand-

cuffed him, and took him down the hall to be booked. When Clark objected during the booking to being photographed without an attorney, Poulton allegedly pushed Clark against the wall and lifted his handcuffed arms over his head, aggravating a previous back injury. Following his transportation to the jail, Clark reportedly did not receive requested medical treatment for his back for several weeks.

While detained in the jail, Clark and several other inmates were transported to court by Jorgenson. On leaving the courtroom, Clark asked to use the restroom and Jorgenson told him he would have to wait. Because of previous surgery, waiting was difficult and uncomfortable for Clark and he later doubled over in the courthouse elevator. Jorgenson allegedly grabbed Clark's neck and chest and pushed him into the elevator wall, again aggravating his back injury. Clark required physical therapy for a year after his release from jail and sought recovery of these medical expenses as part of his damages.[1]

Clark's original complaint was filed May 12, 1986. On May 14, the district court entered an order of reference which stated:

> "IT IS ORDERED that as authorized by 28 U.S.C. § 636(b)(1)(B) and the rules of this court the above entitled case is referred to the magistrate. He is directed to manage the case, to receive all motions filed, hear oral arguments hereon, to conduct evi-

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[1] Clark spent nine months in the jail pending disposition of the charges against him, one of which was dismissed after his acquittal on the other. During his incarceration, his truck was repossessed, and he could not attend school for which he had already paid tuition. Because of this loss of student status, he also lost the deferral of his student loan repayment. In addition to his medical expenses, Clark sought recovery for these losses, as well as injunctive relief relating to his parole and to the jail's magazine subscription policy. We express no opinion on the relief Clark seeks.

> dentiary hearings when proper and make proposed findings of fact, and to submit to the undersigned judge a report and recommendation for the proper resolution of dispositive matters presented."

Rec., vol. I, doc. 2. Pursuant to the order, the magistrate thereafter determined that Clark could proceed in forma pauperis, appointed him counsel, held scheduling and pretrial conferences, conducted an evidentiary hearing (described in the relevant documents as a trial), and issued a report recommending that Clark's claims be dismissed. Clark objected to the report, which the district court summarily adopted in all respects.

II.

REFERENCE TO A MAGISTRATE

We begin our analysis of this issue by examining the jurisdiction and powers of a federal magistrate set out in 28 U.S.C. § 636 (1988). Under section 636(b)(1)(A), a judge may designate a magistrate to hear and determine all pretrial matters except for those disposiitve motions specifically listed therein.[2] The district court reviews a section 636(b)(1)(A) determination under the same standard that an appeals court applies to a district court determination, ascertaining whether the "order is clearly erroneous or contrary to law." *Id.*

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[2] Section 636(b)(1)(A) provides:

> "[A] judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action."

28 U.S.C. § 636(b)(1)(A).

Under section 636(b)(1)(B), the provision which the district court invoked in this case, a magistrate may be designated to conduct evidentiary hearings and submit reports and recommendations in three types of proceedings: 1) hearings on those dispositive motions excepted in section 636(b)(1)(A); 2) applications by criminal defendants for posttrial relief; and 3) prisoner petitions challenging conditions of confinement.[3] Upon the objection by a party to the magistrate's proposed findings and recommendations under this section, the district court is required to make a de novo determination. *Id.*

Section 636(b)(2) allows a judge to appoint a magistrate to serve as a special master, either pursuant to the Federal Rules of Civil Procedure or, upon consent of the parties, without regard to Rule 53(b) of the Federal Rules of Civil Procedure. Section 636(b)(3) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3).

Finally, section 636(c)(1) provides that a magistrate "[*u*]*pon consent of the parties* . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. § 636(c)(1) (emphasis added). Section 636(c)(2) sets out specific requirements regarding such consent:

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[3] Section 636(b)(1)(B) provides:

> "[A] judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement."

28 U.S.C. § 636(b)(1)(B).

> "If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, *notify the parties of their right to consent* to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, *neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent* to reference of any civil matter to a magistrate. *Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.*"

28 U.S.C. § 636(c)(2) (emphasis added). A judgment entered pursuant to Section 636(c)(1) may be appealed either to the court of appeals or to the district court, in the same manner as a district court judgment would be appealed to a court of appeals.[4]

A. Authorization

As we have noted, the district court here stated that the order of reference was made under section 636(b)(1)(B), which applies to hearings on certain dispositive motions, applications for post-conviction relief, and prisoner petitions challenging conditions of confinement. Since no dispositive motion was filed below, and since Clark was not seeking post-conviction relief, the only arguably applicable provision is the one allowing reference of prisoner challenges to conditions of confinement.

Conditions of confinement have been described as "ongoing prison practices and regulations with regard to

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[4] In addition to the provisions discussed above, section 636(a)(3) grants magistrates the power to conduct trials under 18 U.S.C. § 3401 (1988). Section 3401 gives a magistrate jurisdiction to try and sentence defendants accused of misdemeanors upon special designation by the district court and the written consent of the defendant.

matters such as placement in maximum security, deadlocks, unhealthy living conditions, unnecessary exposure to violence-prone inmates, overcrowded physical environments, and cruel or unusual punishment by prison authorities." *Hill v. Jenkins*, 603 F.2d 1256, 1260 (7th Cir.1979) (Swygert, J., concurring). Such ongoing practices do not include "a single incident that occurred in the prison." *Id.* (concurring on ground that loss of property from prison shakedown not condition of confinement). The above definition has been generally accepted by those courts addressing the issue. *See, e.g., Houghton v. Osborne*, 834 F.2d 745, 749 (9th Cir.1987); *Hall v. Sharpe*, 812 F.2d 644, 647 n. 1 (11th Cir.1987); *Wimmer v. Cook*, 774 F.2d 68, 74 n. 9 (4th Cir. 1985); *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir.1982); *but see McCarthy v. Bronson*, 906 F.2d 835, 839 (2d Cir. 1990). This definition, which we likewise adopt, does not encompass the two instances of the use of excessive force alleged by Clark. Those incidents, one of which occurred before Clark was even admitted to the jail, are clearly isolated events rather than part of a series of ongoing jail practices. Accordingly, the reference to the magistrate of the claims is not authorized by section 636(b)(1)(B).

The dissent's characterization of our construction of "conditions of confinement" as unsupported by reason or authority is simply wrong. As the dissent recognizes, only two circuits have reached decisions contrary to the construction we adopt in this opinion, and only one of those circuits has explicitly disagreed with it. *See McCarthy*, 906 F.2d at 839. The court in *McCarthy* relied on *Branch v. Martin*, 886 F.2d 1043 (8th Cir.1989), in which the court noted in passing that "[t]he term 'conditions of confinement' has been interpreted expansively to include almost any prisoner § 1983 action challenging 'the type of confinement, and matters concerning health, safety, or

punishment.'" 886 F.2d at 1045 n. 1 (quoting *Houghton v. Osborne*, 834 F.2d 745, 749-50 (9th Cir.1987), and citing additional cases). However, the cases cited in *Branch* do not support *McCarthy*'s holding because they involve claims falling within our construction of the statute, with the exception of *Archie v. Christian*, 808 F.2d 1132 (5th Cir.1987), which does not describe the challenged conduct, and *Cay v. Estelle*, 789 F.2d 318 (5th Cir.1986), which does not address the condition-of-confinement issue.

Moreover, our construction is grounded, as it must be, on the plain and commonly understood meaning of the word "condition." *See Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979) ("A fundamental canon of construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). "Condition" is defined as "existing state of affairs," and "a mode or state of being." *Webster's Third New International Dictionary* 473 (1981). The word thus clearly connotes an ongoing situation as opposed to an isolated incident. The court in *McCarthy* and the dissent here improperly defend their refusal to give effect to this plain meaning as justified by Congressional policy. The law, however, is to the contrary. "[I]t should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses." *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772, 104 S.Ct. 2105, 2110, 80 L.Ed.2d 753 (1984).

Finally, we note that one of Clark's excessive force claims arises from an alleged incident occurring *before* he was jailed and involving his probation officer. This claim indisputably does *not* challenge a condition of confinement even under the dissent's broad construction of that term.

Nor is the reference authorized under section 636 (b) (3), which permits assignment to the magistrate of additional duties not inconsistent with the Constitution and federal law. This conclusion is compelled by the Supreme Court's analysis in *Gomez v. United States*, —— U.S. ——, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989), in which the Court considered the scope of section 636 (b) (3). In *Gomez*, a magistrate had empaneled a jury in a felony trial over the objection of the defendants. In reversing the defendants' convictions, the Supreme Court concluded that the additional-duties clause, when considered in the context of the overall statutory scheme, does not encompass the seating of a jury in a felony trial.

In reaching this conclusion, the Court relied upon two established canons of statutory construction which apply with equal force in the instant case. First, the Court followed its "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Id.* 109 S.Ct. at 2241. The Court thus obviated the need to consider the constitutionality of assigning felony jury selection to a magistrate under section 636(b) (3) by determining that section 636(b) (3) itself did not authorize such an assignment. In so doing, the Court applied a second principle, stating that in interpreting a statute a court must not be " 'guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " *Id.* (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S.Ct. 1549, 1555, 95 L.Ed.2d 39 (1987)). The Court then reviewed the Act as a whole in light of its evolution and legislative history and concluded that while a literal reading of section 636(b) (3) in isolation would encompass the assignment of the duties at issue, "the carefully defined grant of authority to conduct trials of

civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial." *Id.* 109 S.Ct. at 2245.

Applying these principles to the instant facts, we hold that section 636(b)(3) does not authorize a district court to designate a magistrate to conduct a hearing on a prisoner's petition that does not challenge a condition of confinement. *Gomez* precludes both construing section 636(b)(3) in isolation, and upholding the assignment of additional duties on constitutional grounds without first ascertaining whether the assignment is authorized by the statute when considered as a whole. Here, section 636(b)(1)(B) carefully limits a magistrate's authority to conduct hearings on prisoner petitions, extending that authority only to petitions challenging conditions of confinement. Under *Gomez*, this articulation of specific duties must be construed as implicitly withholding other duties not so specified, particularly when, as here, the contrary construction would in effect render the specific limitations a nullity.[5] *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249, 105 S.Ct. 2587, 2594, 86 L.Ed.2d 168 (1985) ("elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

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[5] The dissent cites *Marvel v. United States*, 719 F.2d 1507 (10th Cir.1983), for the proposition that "the majority's construction of the statute does not avoid deciding a constitutional issue, for this court has already held that Article III allows a magistrate to preside over a civil matter so long as the district court reviews the matter de novo." Dissent at 1436 n. 4. *Marvel* is totally inapposite inasmuch as the parties there consented to trial before the magistrate. *See* 719 F.2d at 1512 ("[W]e hold there is ample statutory authority under 28 U.S.C. § 636(b)(2) to refer a civil case to a federal magistrate for trial on the merits, provided the parties consent to such a procedure.")

Defendants argue on appeal that the reference can be upheld under section 636(c). We disagree. While section 636(c) permits a magistrate to conduct a trial in a civil matter, neither the district court nor the magistrate here purported to act pursuant to that provision. Moreover, magistrate jurisdiction to proceed under section 636(c) requires a special designation by the district court, *id.* § 636(c)(1), and the consent of the parties communicated to the clerk of court, *id.* § 636(c)(2), neither of which is present here.[6] In finding the prerequisites for magistrate jurisdiction under section 636(c) lacking here, we join the great weight of authority and hold that consent under section 636(c)(2) must be explicit and cannot be inferred from the conduct of the parties. *See Securities & Exchange Comm'n v. American Principals Holdings (In re San Vicente Medical Partners, Ltd.)*, 865 F.2d 1128 (9th Cir.1989); *Silberstein v. Silberstein*, 859 F.2d 40 (7th Cir.1988); *Hall v. Sharpe*, 812 F.2d at 647; *Wimmer*, 774 F.2d at 76; *Ambrose v. Welch*, 729 F.2d 1084 (6th Cir. 1984); *but see Archie v. Christian*, 808 F.2d 1132 (5th Cir.1987) (en banc).

B. Jurisdiction

Given our conclusion that the reference was unauthorized, we must consider the significance, if any, of Clark's failure to object to proceeding before the magistrate. The majority of circuits that considered the issue prior to the *Gomez* decision concluded that an improper reference is a matter of jurisdiction and therefore not subject to waiver or harmless-error analysis.

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[6] Section 636(c)(2) also states that "[r]ules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent." Our examination of the Civil Rules of Practice of the United States District Court for the District of Utah reveals no provision for the reference of civil trials to a magistrate. To the contrary, magistrates do not generally even conduct final pre-trial conferences, *see* Rule 9(d), and are specifically precluded from entering any order dispositive of a substantive issue in the case, *see* Rule 9(i).

For example, in *Houghton v. Osborne*, 834 F.2d 745, the Ninth Circuit considered facts closely analogous to those before us. There the district court had referred a prisoner's civil rights action to a magistrate, who held an evidentiary hearing on the merits of the claim and filed proposed findings and recommendations that were adopted by the district court. On appeal, the court held *sua sponte* that the prisoner's claim did not challenge a condition of confinement, and that the district court therefore "lacked the jurisdiction to refer this matter to the magistrate to conduct an evidentiary hearing on the *merits* of Houghton's 1983 action." *Id.* at 750. Similarly, in *Hall* the district court purported to refer a prisoner's civil rights suit to a magistrate under sections 636(b)(1) and (b)(3) for a trial before an advisory jury. The magistrate issued a report recommending acceptance of the jury verdict, which the district court adopted in entering final judgment against the plaintiff. On appeal, the Eleventh Circuit concluded that "the district court's referral of this case was not authorized by any provision of the Magistrate's Act, 28 U.S.C. § 636, and thus the magistrate was without jurisdiction to conduct the trial." 812 F.2d at 646; *see also Lovelace v. Dall*, 820 F.2d 223 (7th Cir.1987) (per curiam) (unambiguous consent of parties required for magistrate to have jurisdiction to enter final judgment under section 636(c)); *Frank v. Arnold (In re Morrissey)*, 717 F.2d 100 (3d Cir.1983) (magistrate had no jurisdiction to hear appeal from bankruptcy court order notwithstanding parties' express consent); *Taylor v. Oxford*, 575 F.2d 152 (7th Cir.1978) (magistrate had no jurisdiction over motion to dismiss for failure to state claim referred under section 636(b)(3) for final disposition pursuant to parties' stipulation and local rule); *but see Archie v. Christian*, 808 F.2d 1132, at 1134-35 (5th Cir.1987) (en banc) (improper reference under sections 636(b)(1)(B) and (b)(3) matter of procedure rather than jurisdiction).[7]

[7] The dissent asserts that our reliance on *Houghton, Lovelace,* and *In re Morrissey* is questionable because those cases do not

In *Gomez*, the defendants had objected to the assignment to the magistrate, but they made no special claim of prejudice on appeal and the government therefore contended that the error was harmless. The Supreme Court rejected this argument, stating that "harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without any meaningful review by a district judge, an officer *exceeds his jurisdiction* by selecting a jury." 109 S.Ct. at 2248 (emphasis added).

Notwithstanding this language, courts subsequent to *Gomez* have varied in their assessment of the relevance of that opinion to cases in which the defendant did not object to the magistrate's unauthorized acts. In *United States v. Mang Sun Wong*, 884 F.2d 1537, 1544-46 (2d Cir.1989) (order on petition for rehearing), *cert. denied*, —— U.S. ——, 110 S.Ct. 1140, 107 L.Ed.2d 1045 (1990), a majority of the panel distinguished *Gomez*, read it narrowly, and held without analyzing the jurisdictional issue that *Gomez* does not require reversal when the defendant consented to the magistrate's improper exercise of power. Judge Altimari dissented, concluding that the issue is one of jurisdiction, and that consent is therefore irrelevant because it "cannot enlarge those powers of office not granted by the Federal Magistrates Act." *Id.* at 1546. *See also United States v. Mussacchia*, 900 F.2d 493 (2d Cir.1990) (following *Mang Sun Wong*, one judge dissenting).

In *United States v. France*, 886 F.2d 223 (9th Cir. 1989), *cert. granted*, —— U.S. ——, 110 S.Ct. 1921, 109 L.Ed.2d 285 (1990), however, the court held *Gomez* ap-

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specifically address the failure to object to an unauthorized reference. The short answer to the dissent's objection is that a determination that the issue is jurisdictional simply obviates the need to address a failure to object. Lack of subject-matter jurisdiction renders lack of objection irrelevant. *See, e.g.*, 15 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3801 at 7 (2d ed. 1986) (subject matter jurisdiction cannot be waived by the parties).

plicable to all cases pending on direct appeal, including those in which the defendant did not object to the magistrate's jury selection. The court did not address the jurisdictional issue, grounding its decision instead on its conclusion that *Gomez* announced a new rule appropriate for retroactive application, and that under Ninth Circuit precedent France had not waived his entitlement to the rule by failing to object at trial. The court did emphasize several times the Supreme Court's references in *Gomez* to the magistrate's lack of "jurisdiction" and "power." *Id.* at 226 & n. 1.

In *United States v. Wey*, 895 F.2d 429 (7th Cir.1990), the Seventh Circuit held that subject matter jurisdiction is not involved and that the unauthorized exercise of power was therefore subject to waiver. The case is thus contrary to the Seventh Circuit's decisions in *Lovelace*, 820 F.2d at 225-26 & n.3, and *Taylor*, 575 F.2d at 154, in which the court held that the magistrate's power under the Act is a matter of jurisdiction and that the parties cannot confer jurisdiction which the magistrate does not possess by failing to object. The court in *Wey* relied in part on the First Circuit decision in *United States v. Lopez-Pena*, 890 F.2d 490 (1st Cir.1989), which was withdrawn upon the grant of rehearing en banc.

In its subsequent en banc opinion, the First Circuit emphasized the jurisdictional language in *Gomez*, and then agreed with *France*, 886 F.2d 223, that *Gomez* must be applied where the magistrate was permitted to empanel the jury, notwithstanding the failure to object. *See United States v. Martinez-Torres*, 912 F.2d 1552 (1st Cir. 1990). In so doing, the First Circuit expressly disapproved of the opinions in *Wey* and *Mang Sun Wong*, and criticized the discussion of consent in *Virgin Islands v. Williams*, 892 F.2d 305, 309-12 (3d Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 2211, 109 L.Ed.2d 537 (1990).

We also disagree with the analysis in *Williams*. There, the court appeared to hold that the issue of the magistrate's power is a jurisdictional matter but nonetheless is subject to waiver. In so doing, the court construed section 636(b)(3) in isolation in direct contradiction to the analysis in *Gomez*, held that the section authorizes the very reference *Gomez* specifically held to be unauthorized, and then decided the constitutional issue *Gomez* deliberately avoided. The concurrence in *Williams* concluded that, although the magistrate's power raises an issue of jurisdiction, *Gomez* does not preclude plain error analysis, and the magistrate's unauthorized exercise of power was not plain error.

In our view, the Supreme Court's language and analysis in *Gomez*, and the language of the Act itself, compel the conclusion that a magistrate's power under the Act is a jurisdictional issue not subject to waiver. The Act speaks in terms of a magistrate's exercise of jurisdiction, *see* 28 U.S.C. §§ 636(c)(1) and (2), and *Gomez* repeatedly refers to a magistrate's jurisdiction. In Parts III and IV of *Gomez*, the Court traced the evolution of the powers of federal magistrates and reviewed the current authority conferred by the Federal Magistrates Act of 1979. *See* 109 S.Ct. at 2242-47. That discussion is couched in terms of Congressional grants of and limitations upon jurisdiction.

The court in *Wey* discounted the obvious impact of the use of the term "jurisdiction" by Congress and the Supreme Court. Instead, the court adopted a plain error rule, observing that although the magistrate's conduct at issue was unauthorized, the district court had subject matter jurisdiction under the relevant jurisdictional statutes. This result ignores the fact that while the limitations in the Magistrate Act do restrict a magistrate's authority to act in a case properly before the district court, the Act also restricts the district court's power to refer a matter to a magistrate. Congressionally imposed limits

on the exercise of judicial power other than the delineation of subject matter jurisdiction are nonetheless jurisdicional. *See Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330, 58 S.Ct. 578, 582, 82 L.Ed. 872 (1938); 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3526 at 227-28 (2d ed. 1984).

> "[T]he jurisdiction of a magistrate to decide a case is not based solely on the consent of the parties, but derives from a proper designation by the district court. Because district court jurisdiction is statutory, its ability to make a proper designation of, and thereby to confer jurisdiction on a magistrate is also a creature of statute."

In re Morrissey, 717 F.2d at 102.

We simply cannot accept an analysis under which parties by their conduct may extend the jurisdiction of both the magistrate and the district court beyond that established by Congress. We therefore hold that the magistrate in this case was without jurisdiction to hear the excessive force claims.[8]

III.

Accordingly, we vacate the judgment dismissing Clark's claims and remand to the district court for further proceeding consistent with this opinion.[9]

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[8] We recognize that two of Clark's claims, his allegations of denial of medical treatment while in the jail and his challenge to the jail magazine policy, do challenge conditions of confinement. However, those claims were consolidated by agreement of the parties with Clark's excessive force claims. Given our conclusion that the parties may not consent to the magistrate's exercise of a power withheld by Congress, the parties' consent here to consolidation cannot vest the magistrate with jurisdiction over claims not referable to him.

[9] We note Clark's argument that the district court did not make the required do novo review of those portions of the magistrate's report to which Clark objected. In view of our conclusion that this

STEPHEN H. ANDERSON, Circuit Judge, dissenting:

I respectfully dissent. The referral of this case to the magistrate was authorized by the statute. Furthermore, Clark waived his right to challenge the magistrate's authority by failing to object below. The judgment should be affirmed.

I.

A.

The referral was authorized by the provision in 28 U.S.C. § 636(b)(1)(B) for "prisoner petitions challenging conditions of confinement." The majority errs by adopting the narrow formulation of Judge Swygert's concurrence in *Hill v. Jenkins*, 603 F.2d 1256, 1259-60 (7th Cir.1979), which is not supported by reason or authority.[1] This court should follow the two circuits which have interpreted section 636(b)(1)(B) to authorize the referral to a magistrate of prisoner suits complaining of specific incidents. *See McCarthy v. Bronson*, 906 F.2d 835, 839 (2d Cir.1990); *Thompson v. Nix*, 897 F.2d 356,

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case must be remanded in any event, we need not address this argument other than to observe that our opinion in *Gee v. Estes*, 829 F.2d 1005, 1008-09 (10th Cir.1987), is available for the guidance of the court on this issue on remand.

[1] Judge Swygert's concurrence cites no authority for his narrow construction of the statute, and the cases adopting his construction cite no authority other than the concurrence and the other cases adopting it.

In addition, it is not clear that the Eleventh Circuit agrees with Judge Swygert. *Hall v. Sharpe*, 812 F.2d 644, 647 n. 1 (11th Cir. 1987), involved a complaint alleging a single incident, but the judgment below was reversed not because the incident was not a condition of confinement, but because section 636(b)(1)(B) does not authorize magistrates to preside over jury trials. Because the citation in *Hall* to *Hill* is dictum, "only two circuits," *supra* at 1429, clearly interpret "conditions of confinement" to exclude single incidents.

357 (8th Cir.1990); *Branch v. Martin*, 886 F.2d 1043, 1045 & n. 1 (8th Cir.1989).[2]

> "Subsection 636(b)(1)(B) was added in 1976 as part of a broadening of the authority of magistrates. Act of Oct. 21, 1976, Pub.L. 94-577, 90 Stat. 2729. The House Report does not explain the category 'prisoner petitions challenging conditions of confinement' but does refer to 'petitions under section 1983 of Title 42.' H.R.Rep. No. 1609, 94th Cong., 2d Sess. 11, *reprinted in* 1976 U.S.Code Cong. & Admin. News 6162, 6171. . . .
>
> We see no reason why a Magistrate with clear authority to hold hearings and recommend findings as to the unconstitutionality of continuing prison conditions may not perform a similar function as to specific episodes of unconstitutional conduct by prison officials. The phrase 'conditions of confinement' appears not to have been selected as a limitation to preclude episodes of misconduct, but rather as a generalized category covering all grievances occurring during prison confinement."

McCarthy v. Bronson, 906 F.2d at 839.

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[2] The majority's suggestion that the Eighth Circuit does not disagree with their interpretation of the statute is incorrect. That court has approved the referral to a magistrate, as "prisoner petitions challenging conditions of confinement," a claim that prison officials "assault[ed the plaintiff] on two occasions," *Thompson v. Nix*, 897 F.2d at 357, and a claim that "on September 10, 1986, when defendants escorted [plaintiff] from a waiting room to his cell, defendants used excessive force against him." *Branch v. Martin*, 886 F.2d at 1044. Moreover, some of the cases cited in *Branch* fall outside the majority's construction of the statute. The plaintiff in *Gee v. Estes*, 829 F.2d 1005, 1006 (10th Cir.1987), alleged, *inter alia*, an incident where "he was dragged into court with no clothing on except an oversized pair of trousers which dropped to his knees to expose him to the spectators." The plaintiff in *Cay v. Estelle*, 789 F.2d 318, 319 (5th Cir.1986), alleged "that on August 3, 1982, when [he] asked to be relieved from work duties because of a back injury, he was beaten severely . . . ."

According to the majority, a suit alleging that a prisoner was beaten once must be heard by an Article III judge, but a claim that the prisoner is beaten daily may be referred to a magistrate. Limiting the magistrate's jurisdiction to the more serious claim makes no sense, and nothing in the legislative history persuades me that Congress intended such an anomaly. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71, 102 S.Ct. 1534, 1538, 71 L.Ed.2d 748 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."). Their interpretation conflicts with the legislative intention to give magistrates broad authority to assist judges. *See* H.R.Rep. No. 1609, 94th Cong., 2d Sess. 6-8, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162, 6166-68.

One of the incidents in this case occurred shortly after Clark was arrested. The other took place while he was in pretrial detention. At neither time was he free to leave. Certainly, he was in confinement.[3] *See Wimmer v. Cook*, 774 F.2d 68, 69, 74 (4th Cir.1985) (pretrial detention); *see also Worley v. Sharp*, 724 F.2d 862, 863 (10th Cir. 1983) (same), *reh'g denied*, 759 F.2d 786 (10th Cir. 1985). Because his complaint challenged conditions of his confinement, section 636(b)(1)(B) authorized the referral.

B.

If the referral was not authorized by that subsection, it was authorized by section 636(b)(3). The articulation of specific duties in subsection (b)(1)(B) did not "im-

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[3] "Confinement" is the "[s]tate of being confined" or "shut in" "by either a moral or a physical restraint, by threats of violence with a present force, or by physical restraint of the person." *Black's Law Dictionary* 157 (abr. 5th ed. 1983).

plicitly withhold[] other duties not so specified. . . ." *Supra* at 1431. Subsection (b)(3) is a "'catchall' provision." *Garcia v. Boldin*, 691 F.2d 1172, 1178 (5th Cir. 1982); *accord, e.g., King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1185 (7th Cir.1987). "Where the district court is not specifically empowered to refer a case, it may do so under the general provision of 28 U.S.C. § 636(b)(3). . . ." *Hall v. Vance*, 887 F.2d 1041, 1046 (10th Cir.1989).

In *Mathews v. Weber*, 423 U.S. 261, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976), the Supreme Court reviewed the legislative history of the original Act:

> "The three examples § 636(b) sets out are, as the statute itself states, not exclusive. The Senate sponsor of the legislation, Senator Tydings, testified in the House hearings:
>
> > 'The Magistrate[s] Act specifies these three areas because they came up in our hearings and we thought they were areas in which the district courts might be able to benefit from the magistrate's services. We did not limit the courts to the areas mentioned. . . .
> >
> > 'We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of their courts.' "

Id. at 267, 96 S.Ct. at 553 (quoting *Hearings on the Federal Magistrates Act Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 81 (1968)). The legislative history of the 1976 amendments to the Act confirms the expansiveness of subsection (b)(3):

> "This subsection enables the district courts to continue innovative experimentations in the use of this judicial officer. At the same time, *placing this authorization in an entirely separate subsection empha-*

> *sizes that it is not restricted in any way by any other specific grant of authority to magistrates.*"

H.R.Rep No. 1609, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S.Code Cong. & Admin.News 6162, 6172 (emphasis added). The statutory authorization for referring to magistrates prisoner petitions challenging conditions of confinement was not meant as a bar to the referral of prisoner petitions unrelated to conditions of confinement.[4] *See, e.g., John v. Louisiana*, 899 F.2d 1441, 1446 (5th Cir. 1990) (subsection (b)(3) authorizes post-trial referral of sanctions question even though subsection (b)(1)(A) only refers to pretrial matters).

As is true of the majority's construction of subsection (b)(1)(B), their construction of subsection (b)(3) has absurd consequences. If (b)(3) only applies to matters not addressed in (b)(1), then a suit by a prisoner about

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[4] *Gomez v. United States*, —— U.S. ——, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989), does not require a contrary conclusion. There, the Court concluded that "the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial," *id.* at 2245, because

> "[w]hen a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties."

Id. at 2241. Presiding over a felony trial bears no relation to the duties specified in the statute, but presiding over a prisoner's section 1983 action does.

Also, unlike in *Gomez*, the majority's construction of the statute does not avoid deciding a constitutional issue, for this court has already held that Article III allows a magistrate to preside over a civil matter so long as the district court reviews the matter de novo. *Marvel v. United States*, 719 F.2d 1507, 1513 (10th Cir. 1983). (That the parties in that case consented to proceeding before the magistrate is irrelevant, for parties cannot expand Article III limitations on a tribunal's jurisdiction. *Insurance Corp. of Ireland v. Compagnie des Bauxities de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982).)

something which preceded his confinement may not be referred to a magistrate (because it is "a prisoner's petition that does not challenge a condition of confinement," *supra* at 1431) but a suit by a non-prisoner making an identical allegation may be.

II.

I also disagree with the majority's conclusion that the absence of statutory authorization for a magistrate's participation is a non-waivable jurisdictional defect. I would hold that the issue was waived by Clark's failure to object below.

The authority upon which the majority relies does not support its conclusion. Many of the cited cases do not address the effect of a failure to object to a referral to a magistrate. *See Gomez v. United States*, —— U.S. ——, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989); *Houghton v. Osborne*, 834 F.2d 745 (9th Cir.1987); *Lovelace v. Dall*, 820 F.2d 223 (7th Cir.1987); *In re Morrissey*, 717 F.2d 100 (3d Cir.1983). In the others, the failure to object was excused on grounds other than non-waivability. *See United States v. Martinez-Torres*, 912 F.2d 1552, 1554 & n. 3 (1st Cir.1990) (objection would have been futile because of existing circuit authority); *United States v. France*, 886 F.2d 223, 228 (9th Cir.1989) (same), *cert. granted*, —— U.S. ——, 110 S.Ct. 1921, 109 L.Ed.2d 285 (1990)[5]; *Hall v. Sharpe*, 812 F.2d 644, 649 (11th Cir. 1987) (appellant was allowed to rely upon the appellee's

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[5] While the Ninth Circuit decided the case on different grounds, one of the issues before the Supreme Court, to be heard Tuesday, October 2, is whether a magistrate's lack of statutory authority is a non-waivable defect. *See* Brief of the United States at 19-21, *United States v. France*, —— U.S. ——, 110 S.Ct. 1921, 109 L.Ed.2d 285 (1990). In my view, we should "decline appellant's invitation to rule in a vacuum," *United States v. De La Cruz*, 902 F.2d 121, 125 (1st Cir.1990), and await the Court's decision before deciding the instant case. Deciding the matter immediately serves little purpose, but risks wasting judicial resources.

objection to proceeding before a magistrate). *Taylor v. Oxford*, 575 F.2d 152, 154-55 (7th Cir.1978), appears to agree with the majority, but that opinion, as well as *Lovelace v. Dall*, 820 F.2d 223 (7th Cir.1987), has been superseded by *United States v. Wey*, 895 F.2d 429 (7th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 3283, 111 L.Ed.2d 792 (1990).[6]

The cases which consider the issue hold that a magistrate's lack of statutory authority is not a jurisdictional defect, so any objection is waived if not raised. *See id.* at 431; *Mylett v. Jeane*, 879 F.2d 1272, 1275 (5th Cir. 1989); *United States v. Vanwort*, 887 F.2d 375, 382-83 (2d Cir.1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1927, 109 L.Ed.2d 290 (1990); *see also Government of the Virgin Islands v. Williams*, 892 F.2d 305, 309-312 (3d Cir.1989) (failure to object constitutes consent to reference), *cert. denied*, —— U.S. ——, 110 S.Ct. 2211, 109 L.Ed.2d 537 (1990).[7]

Any error below was a procedural lapse, not a jurisdictional failing. *Archie v. Christian*, 808 F.2d 1132, 1134-35 (5th Cir.1987). "We do not have a 'jurisdictional' problem. . . . We have at most a mistaken interpretation of a law designating which judicial officer shall preside over which proceedings." *United States v. Wey*, 895 F.2d at 431.

Gomez does not control, for the appellant there did object to the magistrate's involvement. *United States v. Sawyers*, 902 F.2d 1217, 1220 (6th Cir.1990); *United*

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[6] Similarly, *Government of the Virgin Islands v. Williams*, 892 F.2d 305 (3d Cir.1989), calls *In re Morrissey*, 717 F.2d 100 (3d Cir. 1983), into doubt.

[7] A panel of the First Circuit also reached this conclusion in *United States v. Lopez-Pena*, 890 F.2d 490, 495 n. 6 (1st Cir.1989) (advance edition), but the opinion was withdrawn so the case could be reheard en banc and the en banc opinion does not address the issue. *See United States v. Martinez-Torres*, 912 F.2d at 1558 n. 8 (Selya, J., dissenting).

States v. Mang Sun Wong, 884 F.2d 1537, 1545 (2d Cir. 1989), *cert. denied*, —— U.S.——, 110 S.Ct. 1140, 107 L.Ed.2d 1045 (1990). *Gomez*'s mention of "jurisdiction" does not mean that the Act is a jurisdictional statute. "[T]he word is a many-hued term. . . . *Gomez* uses the word 'jurisdiction' in a context revealing that the Court meant 'authority.'" *United States v. Wey*, 895 F.2d at 431; *accord United States v. Musacchia*, 900 F.2d 493, 503 (2d Cir.1990) (court is "[u]nable to square the Supreme Court's use of the word 'jurisdiction' with traditional notions of subject matter jurisdiction"); *Black's Law Dictionary* 443 (abr. 5th ed. 1983) ("The word is a term of large and comprehensive import, and embraces every kind of judicial action.").

III.

On August 18, 1987, the magistrate held an evidentiary hearing, which was recorded. On September 16, he recommended that Clark's suit be dismissed. Clark objected to this recommendation, but on December 31 the district court dismissed the action. The dismissal order states that the court "made a de novo review" of the case, R. Vol. I, Tab 49, at 2, but the recording of the evidentiary hearing had not yet been transcribed.

"When objections are made to the magistrate's factual findings based on conflicting testimony or evidence, both § 636(b)(1) and Article III of the United States Constitution require de novo review." *Gee v. Estes*, 829 F.2d 1005, 1008 (10th Cir.1987). "In conducting this review, the district court must, at a minimum, listen to a tape recording or read a transcript of the evidentiary hearing." *Id.* at 1009.

Gee was decided three months before the district court dismissed Clark's action. We presume that the district court knew the relevant law, *United States v. Lowden*, 905 F.2d 1448, 1449 n. 1 (10th Cir.1990), so the court's statement that it conducted a de novo review must be taken

to mean that it listened to the tape recording of the hearing before it dismissed Clark's suit. Indeed, because of the expense and delay [8] of transcription, district courts commonly listen to a tape rather than await a transcript.

Branch v. Martin, 886 F.2d 1043 (8th Cir.1989), which remanded in similar circumstances, is distinguishable. As here, the district court adopted the magistrate's recommendations before the transcript of a recorded hearing was prepared. As here, the district court stated that it had conducted a de novo review, but did not say anything about listening to the tape. *Id.* at 1046; *see also Moran v. Morris*, 665 F.2d 900, 901-02 (9th Cir.1981) (court of appeals remanded for further review of tape-recorded proceedings before magistrate after district court adopted magistrate's recommendations the day they were issued). The important distinction is that *Branch* announced for the Eighth Circuit the rule we adopted in *Gee*. The district court in *Branch* did not have the benefit of that decision, but the court below was aware of *Gee*. The doubts the Eighth Circuit held about the breadth of that district court's review would be unfounded here.

IV.

On the merits of Clark's claims, I agree with the decision of the district court. Accordingly, I would affirm the judgment.

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[8] The transcript in this case was not prepared until almost 14 months after the hearing was held. *See* R.Supp. Vol. II.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No: C-86-396W

JAMES EDWARD CLARK,
Plaintiff,

-vs-

SALT LAKE COUNTY JAIL, *et al.*,
Defendants.

ORDER DISMISSING PLAINTIFF'S COMPLAINT

[Filed Dec. 31, 1987]

This matter is before the court on the plaintiff's Objections to the Report and Recommendation of the U.S. Magistrate recommending that each claim of the plaintiff's suit be dismissed for no cause of action. The plaintiff brought suit under 42 U.S.C. § 1983 for two separate incidents which, by stipulation of the parties, were tried together. The case was referred to the U.S. Magistrate under 28 U.S.C. § 636(b)(1)(B) and on August 18, 1987, a trial hearing was held before the magistrate who took the matter under advisement and subsequently submitted a report and recommendation suggesting that all claims be dismissed. On September 29, 1987, the plaintiff filed objections to that report and recommendation, which objections can be grouped into the following four categories: (1) that the plaintiff's arrest by his parole officer, defendant Robert Poulton, was improper; (2) that officers

Robert Poulton and David Jorgenson willfully and maliciously assaulted and injured the plaintiff in separate incidents; (3) that the plaintiff's appointed counsel failed to adequately represent him in the course of trial and subsequently inappropriately refused to file objections to the magistrate's report and recommendation; and (4) that the ten-day period in which the plaintiff was ordered to object to the report and recommendation if he intended to do so was not an adequate amount of time for the plaintiff in light of his unfamiliarity with the law.

The court has made a de novo review of this case and concludes the following.

(1) The plaintiff's arrest by his parole officer, defendant Poulton, was not improper inasmuch as the plaintiff was sought on robbery charges and his conduct in the probation office was boisterous and obscene.

(2) Defendant Poulton did not use excessive force in arresting or photographing the plaintiff, especially in light of the abusive and uncooperative conduct of the plaintiff. Defendant Jorgenson's handling of the plaintiff in a separate incident in a public elevator did not violate the plaintiff's civil rights inasmuch as the security needs of the situation necessitated Jorgenson's actions, especially in light of the plaintiff's uncooperative and threatening behavior. Furthermore, the injuries claimed by the plaintiff as a result of these two incidents have been neither proven nor proximately linked to the actions of defendants Poulton and Jorgenson.

(3) The plaintiff's claim against the Salt Lake County Jail fails under the Eleventh Amendment inasmuch as a state agency cannot be sued without its consent, which has not been given in this instance. Furthermore, the plaintiff's claim against Salt Lake County fails for the same reason and also because it does not show that the plaintiff's civil rights were violated by a custom or policy of the county nor by the actions of a county policy-maker.

(4) The plaintiff has failed to support his allegation of inadequate representation by counsel. There is no constitutional right to counsel in the prosecution of civil rights cases and the appointment of counsel in this case was done at the court's discretion. Therefore the plaintiff's claim of inadequate representation in itself, without supporting evidence, will not prevent his civil rights complaint from being dismissed for a finding of no cause.

Accordingly,

IT IS HEREBY ORDERED that the United States Magistrate's report and recommendation is adopted in all respects and the plaintiff's suit is dismissed for no cause of action.

Dated this 31st day of December, 1987.

/s/ David K. Winder
DAVID K. WINDER
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 86-C-0396W

JAMES EDWARD CLARK,
Plaintiff,

vs.

SALT LAKE COUNTY JAIL, *et al.*,
Defendants.

REPORT AND RECOMMENDATION

[Filed Sep. 16, 1987]

The plaintiff, James Edward Clark, filed suit under 42 U.S.C. § 1983 against Salt Lake County for a situation that occurred in the Salt Lake County Jail and against Robert Poulton, a probation officer with the Utah Department of Corrections, for another separate incident. Counsel was appointed for plaintiff and at a pretrial hearing before the magistrate all parties stipulated that the two incidents, although not related, should be tried together.[1] (File Entry #22). Thereafter plaintiff filed an amended complaint (File Entry #24) in which he named Robert Poulton, the Utah State Department of Corrections, David Jorgenson, Salt Lake County Deputy

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[1] The damage issue in plaintiff's case is, in each instance, related.

Sheriff and Salt Lake County. The plaintiff's claims are that while he was on parole on November 4, 1985 he reported to his parole officer Robert Poulton who arrested him and used excessive force against him at the time and in transporting plaintiff to jail. Plaintiff claims he was denied medical attention while being held in the Salt Lake County Jail. The plaintiff also claims that on December 13, 1985 while being transported from a court appearance to the Salt Lake County Jail, plaintiff was denied the opportunity to use a restroom and was assaulted by defendant Jorgenson. The plaintiff claimed as a result of the defendants' conduct, a back condition he had previously incurred was seriously aggravated causing him pain and loss of function. The defendants' denied the plaintiff's contentions with reference to the alleged events. Plaintiff also complained in his amended complaint of being illegally held in the County Jail, but the plaintiff offered no evidence or legal basis for that contention and has apparently not pursued the claim.

The case was referred to the magistrate under 28 U.S.C. § 636(b)(1)(B). On August 18, 1987 a trial hearing was held before the magistrate. This report and recommendation is submitted pursuant to the reference.

The plaintiff's evidence at the hearing was his own testimony about each of the issues in dispute. The plaintiff had requested that an inmate at the Utah State Prison (U.S.P.) by the name of Dicky Thompson be made available. The magistrate made an effort to have the Utah State Prison produce the witness. The U.S.P. advised that they had no inmate named "Dicky" Thompson, but that they had two inmates named Richard Thompson. Therefore, no witness could be made available without further information and identification. Plaintiff and his counsel were notified of the fact at the time of hearing and given a chance to further identify the witness and to have time to arrange for the witness's

presence. However, plaintiff presented his case and rested without exercising the opportunity for other witnesses.[2]

The plaintiff testified that while on parole he received word when he was in Indiana that he was suspected of some bank robberies in Utah. He came back to Utah to clear up the matters and on November 4, 1985 he reported to his parole officer, defendant Robert Poulton in Salt Lake City.

The plaintiff testified that his back was, at the time, in good condition. However, the evidence showed that the plaintiff injured his back in 1973 while working with a hydraulic lift. He received medical attention at that time. In 1983, while at the U.S.P., the plaintiff was injured while working on a road crew when he was thrown from a truck. He was treated for his injury which involved damage to his back. About a year and a half before the incidents complained of in this action plaintiff again injured his back in a vehicle accident.

Plaintiff testified that on reporting to Poulton he was handcuffed and told he would be photographed. Plaintiff objected to being photographed without having counsel present and put his head down to resist being photographed. According to plaintiff, Poulton pushed him and grabbed his neck and "slammed" plaintiff around to be photographed. Plaintiff claimed the action injured his neck and back. Plaintiff said he was pushed against the wall twice. While plaintiff was handcuffed, he said his arms were pulled above his back and he was dragged to jail. At the jail, the plaintiff said, he told a medic that he had injured his back and neck when he was roughed up. Also he advised the medical staff that he was "coming off" heroin. Plaintiff contended nothing was done to give him any treatment. This was contradicted by other evidence including plaintiff's medical records.

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[2] Plaintiff made arrangements for plaintiff's wife to be present as a witness but she did not appear at the time of hearing.

On December 13, 1985 the plaintiff was taken from the jail to court. One of the transportation deputies was defendant David Jorgenson. After plaintiff was through with court and he and other inmates were being transported back to jail, plaintiff requested to use a public restroom. Jorgenson indicated plaintiff could not use the restroom. This was because other inmates, about five, were being transported and there was insufficient security personnel and a public restroom creates security problems. Jorgenson told plaintiff he would have to wait until they got back to the jail which would be in a minute or two. Plaintiff again requested to use the public restroom and was refused. Plaintiff testified he had had peritonitis of the appendix that created a urinary problem. Plaintiff's jail medical records do not show any such condition or problem. Plaintiff testified that when he was in the elevator he bent over and grabbed his crotch because of his discomfort. At that point according to plaintiff, Jorgenson, then slammed plaintiff up against the elevator wall, grabbed plaintiff's neck, choked plaintiff and kneed him in the groin. Plaintiff claims this further injured his back. The plaintiff was then taken to the jail a short distance away and in the jail receiving area plaintiff was allowed to use the toilet.

Following the December 13, 1985, incident the plaintiff was taken to the University of Utah Medical Center. However, on December 17, 1985, plaintiff was seen by one of the jail doctors, Dr. Askins, recorded that plaintiff said he was in an altercation with an arresting officer and was threatening litigation. Dr. Askins found near full range of back movement, but some tenderness and diagnosed a cervical strain. Plaintiff had advised the doctor of plaintiff's prior back problems. Plaintiff was periodically treated by jail medical personnel but on December 19, 1985, the University Medical staff diagnosed a possible "perched facet C4-5." Additional examination and a "tomography" was recommended. (Def's Exhibit A). X-rays were taken by jail medical staff before the University examination.

A tomogram was performed on February 11, 1986. That examination ruled out a "C4-5 perched facet." The examination found the cervical spine was "normal." During the time plaintiff was detained in the Salt Lake County Jail he saw physicians, nurses and medical staff on several occasions for various complaints and was given some medications. (Def's Exhibit A). Plaintiff's Exhibits 1, 2, 3 and 4 are medical bills incurred for physical therapy and radiology which plaintiff contends were attributable to the incidents about which he complains.

Maurice Escobar, a parole officer for the Utah Department of Corrections was present at the time of the defendant's arrest at the parole hearing and testified as to the circumstances. The defendant, Robert Poulson, did not appear or testify at trial, he has left the parole office and is currently in the Army out of the District.[3]

Esobar testified that when plaintiff appeared at the parole office on November 4, 1985 he was heard shouting and using profanity. Poulton had not touched the plaintiff. Poulton indicated he wanted to take the plaintiff's picture and plaintiff was beligerent and exclaimed, "Nobody's going to take no fucking pictures." The plaintiff was swinging his arms, shouting and using profanity. Agent Poulton then told the plaintiff he was under arrest.[4] Poulton took plaintiff's arm, secured it by pressing Poulton's shoulder against plaintiff's arm and handcuffed the plaintiff. Little or no force was used except that in the fixing of the handcuffs. Plaintiff continued to shout. The plaintiff was motioned by Poulton to a wall away from where plaintiff was handcuffed in order to be photographed. Plaintiff was told to stand against the wall for a photograph. Plaintiff protested and Poulton took hold

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[3] No effort has been made to invoke the provisions of the Soldiers and Sailors Civil Relief Act, 50 U.S.C. App. § 521, as a bar to this action.

[4] Apparently for violation of plaintiff's parole because of the alleged commission of other crimes, i.e. robbery.

of plaintiff by the arm and guided plaintiff to the wall where plaintiff stood while his picture was taken. Plaintiff was escorted to the outside of the parole office by Escobar and Poulton where he was transported by a deputy sheriff to the jail. (See Booking Record, Def's Exhibit A). According to Escobar, plaintiff's arms were never twisted or raised over his back.

Chyrl A. Bourdeaux, a secretary in the parole office at the time of plaintiff's arrest said she was first attracted to plaintiff by his loud abusive language. Her desk was located where she could observe the plaintiff's actions. She said plaintiff was waving his arms and Poulton told him he was under arrest. Poulton turned to the plaintiff and restrained his arm, cuffed him, and then turned him around. Plaintiff was still abusive. Plaintiff was then moved to the wall for a picture. The plaintiff was never pushed or forced. He was merely escorted to the wall for his picture. He was never thrown against the wall or his arms twisted over his back.

David Jorgenson, testified that on December 13, 1985, he and another officer were transportation officers designated to take prisoners to court. He transported plaintiff with four other inmates to Judge David Dee's criminal calendar. The prisoners were in two groups. There was an audience in court and a large number of persons in the hallway outside because the County Commission Chambers were nearby. The plaintiff also had friends in the courtroom. A public elevator is used to transport from the courtroom to the jail tunnel. Prisoners are not allowed communication with the public. Although a public restroom is nearby, it is not for prisoner use because of security problems. While at the elevator plaintiff requested to use the restroom. Jorgenson told plaintiff that Jorgenson had the same problem but that they would have to wait until they got back to the jail. The plaintiff kept asking and as the elevator door opened and the prisoners and officers entered, plaintiff said "Fuck you, I am going

here." Plaintiff put his hand in the front of his pants and appeared to be reaching for his penis. Jorgenson then placed his hand at the base of plaintiff's neck and lightly held him up against the elevator wall and said "Don't even think about it." Plaintiff was told he was only a couple of minutes away from the jail. Plaintiff then began yelling and using profanity. The group then went through the jail tunnel to the receiving area where plaintiff was allowed to use the toilet.

Officer Jorgenson also transported the plaintiff to the University Medical Center the next day or so. Plaintiff said as a result of the prior incident, he was afraid to tell the doctor anything although no threats or force of any kind was used against him.

Officer Douglas C. Ugstadt was the other transportation officer who took plaintiff to court and back. His testimony was directly corroborative of Jorgenson's. He said Jorgenson used "no real force," but merely moved the plaintiff back about four to six inches where Jorgenson admonished plaintiff. After the incident nothing more was said about it.

Gayna Svee, the nurse supervisor and health administrator at the Salt Lake County Jail testified there were several physicians that serviced the jail. The plaintiff was received at the jail on November 4, 1985. A separate medical screening sheet was made out on him at the time and plaintiff did not complain of an injury although his heroin addiction was noted. On November 6, 1985 plaintiff went on sick call for a "back problem, teeth and withdrawal." He was seen by Dr. Askins whose notes reflect only concern with the withdrawal for which plaintiff was treated. Defendant's Exhibit A reflects the plaintiff was seen regularly by medical personnel between November 4, 1985 and July 29, 1986 for a wide variety of complaints. He was seen as noted before on December 13, 1985 for his back complaints and was given a muscle relaxer as well as the course of treatment noted above

involving the Salt Lake County Jail staff and the University of Utah Medical Center (Def's Exhibit A).

Based on the above evidence it is found:

(1) That on November 4, 1985, plaintiff appeared at the office of the Adult Parole Unit of the Utah Department of Corrections. Plaintiff was sought on robbery charges. On his appearance he was boisterous and obscene. He was placed under arrest by plaintiff Poulton.

(2) Poulton's use of force in arresting plaintiff was limited to handcuffing plaintiff while using limited and proper restraint and in moving plaintiff to a wall for his photograph.

(3) Plaintiff was escorted from the parole office in handcuffs but was not otherwise abused. His custody was transferred to a deputy sheriff who transported plaintiff to jail. No improper force was used during the transportation. At the jail, plaintiff, during booking and medical screening, did not complain of any injury to his back, but did indicate a heroin withdrawal problem.

(4) Plaintiff had a long history of back difficulty from 1973 to the dates involved in this action. There is no evidence that plaintiff's back condition was aggravated by any action of the defendant Poulton or any official of the Utah Department of Corrections. However, plaintiff did have back problems while in the jail.

(5) Plaintiff was allowed sick call at the Salt Lake County Jail for his medical complaints and was treated by physicians and medical staff at the jail and the University of Utah hospital. He was given pain killers, x-rays and provided with other medications. Plaintiff has incurred medical expenses for therapy for his back condition.

(6) On December 13, 1985 while being transported from court to the jail the plaintiff requested to use a public restroom because of a need to urinate. Plaintiff had

a condition that caused him discomfort. The transportation officer David Jorgenson refused the plaintiff's request to use the public restroom because of security reasons which were valid. The jail where plaintiff could relieve himself was in the immediate vicinity and only about two or three minutes of discomfort was required until plaintiff could relieve himself. Plaintiff then made a motion as though he was going to urinate in a public elevator. Jorgenson, to stop plaintiff, put Jorgenson's hand on plaintiff's upper chest and moved the defendant upright a distance of four to six inches against the elevator wall with light and reasonable force. Officer Jorgenson then admonished plaintiff not even to think about urinating. The plaintiff sustained no injury to his back from this incident.

(7) Although plaintiff did suffer from some back distress while in the Salt Lake County Jail, it was not brought on by any improper use of force by any defendant in this case. Even so, plaintiff was given fully adequate medical attention for his back condition and other medical needs during plaintiff's confinement.

Conclusions

The suit against the Utah Department of Corrections must fail for two reasons. First, the Eleventh Amendment to the United States Constitution prohibits suit against the State of Utah or any of its agencies in federal court without consent. *Alabama v. Pugh*, 438 U.S. 781 (1978); *Kennecott Copper Co. v. Tax Commission*, 327 U.S. 573 (1946). The State of Utah nor the Utah Department of Corrections has given such consent. Therefore, as to the Utah Department of Corrections this court is without jurisdiction. Even so, there is no evidence of any action on the part of the Utah Department of Corrections that violated any civil right of plaintiff. Therefore, the action against the Utah Department of Corrections should be dismissed.

As to the claim against Salt Lake County, before the plaintiff may prevail on his claim he must show the violation of his civil rights was due to a custom, ordinance or policy of the County. *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Littlefield v. Deland*, 641 F.2d 729 (10th Cir. 1981). Or that any violation of plaintiff's rights was due to the actions of a County policymaker. *Pembaur v. City of Cincinnati*, —— U.S. ——, 106 S.Ct. 1292 (1986). There is no evidence, disregarding the findings stated above, and assuming *arguendo* a violation of plaintiff's civil rights by officer Jorgenson, that any violation of plaintiff's civil rights was attributable to any custom, ordinance or policy of Salt Lake County or a policymaker. Also the evidence shows plaintiff's serious medical needs were not disregarded. *Estelle v. Gamble*, 429 U.S. 97 (1976). Therefore, the action against Salt Lake County should be dismissed.

The plaintiff's action against Robert Poulton is based generally on a theory of use of excessive force. Poulton has a right to request that the plaintiff be photographed, 77-26-18, U.C.A., 1953, and to use reasonable force to accomplish the taking of the photograph. The plaintiff had no right to have counsel present during the photographing. *United States v. Ash*, 413 U.S. 300 (1973); C.f. *United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Mara*, 410 U.S. 19 (1973). Therefore, defendant Poulton violated no right of defendant.

An officer may not use unreasonable or excessive force in carrying out an otherwise lawful duty. *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984) cert. denied 106 S.Ct. 65. As noted above no unreasonable or unlawful force was used. To the extent that any force was used it was due to the plaintiff's own conduct and was necessitated by such conduct. An excessive use of force against a person by an officer may deny a person due process of law. *Trujillo v. Goodman*, —— F.2d ——, (10th Cir. Aug. 7, 1987). The Court observed:

> "Force inspired by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience, or by malice rather than mere carelessness, may be redressed under Section 1983." Slip Op. p.12 quoting from *Hewitt v. City of Truth or Consequences*, 758 F.2d 1375, 1379 (10th Cir.) cert. denied 106 S.Ct. 131 (1985).

Applying the above standard Officer Poulton violated no right of plaintiff and plaintiff has no claim for relief.

As to plaintiff's claim against defendant Jorgenson, the same result is dictated. No excessive force was used. A limited control of plaintiff was exercised in the elevator because of the plaintiff's threat and overt act to urinate in the elevator. Under such circumstances no violation of plaintiff's rights occurred. *Sampley v. Ruettgers*, 704 F.2d 491 (10th Cir. 1983); *Trujillo v. Goodman*, supra; *Wise v. Bravo*, 666 F.2d 1528 (10th Cir. 1981). The officer did not act improperly in restricting plaintiff's access to a public restroom for a few minutes because of security reasons. *Bell v. Wolfish*, 441 U.S. 520 (1979). The officer's actions were otherwise not unreasonable.

The plaintiff's suit should be dismissed for no cause of action. IT IS SO RECOMMENDED.

Copies of the foregoing report and recommendation are being mailed to the parties. They are hereby notified of their right to file objections hereto within 10 days from the receipt hereof.

DATED this 16th day of September, 1987.

/s/ Ronald N. Boyce
RONALD N. BOYCE
United States Magistrate

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No: 86-C-0396W

JAMES EDWARD CLARK,
Plaintiff,

-vs-

STATE OF UTAH,
Defendant.

ORDER OF REFERENCE

IT IS ORDERED that as authorized by 28 U.S.C. § 636 (b) (1) (B) and the rules of this court the above entitled case is referred to the magistrate. He is directed to manage the case, to receive all motions filed, hear oral arguments hereon, to conduct evidentiary hearings when proper and make proposed findings of fact, and to submit to the undersigned judge a report and recommendation for the proper resolution of dispositive matters presented.

Dated this 13th day of May, 1986.

/s/ David K. Winder
DAVID K. WINDER
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-1177

JAMES EDWARD CLARK,
Plaintiff-Appellant,

v.

ROBERT POULTON, UTAH STATE CORRECTIONS DEPARTMENT, DAVID JORGENSEN, SALT LAKE COUNTY SHERIFF'S OFFICE, JOHN DOES I THROUGH X,
Defendants-Appellees.

ORDER

Filed July 1, 1992

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel who rendered the decision sought to be reheard. Judge Seymour would vote to grant rehearing.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to the panel members and to all the judges of the court in regular active service. No member of the

panel and no judge on the court in regular active service having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-1177

(DC# 86-C-0396W)

JAMES EDWARD CLARK,
Plaintiff-Appellant,

v.

ROBERT POULTON, UTAH STATE CORRECTIONS DEPARTMENT, DAVID JORGENSON, SALT LAKE COUNTY SHERIFF'S OFFICE, JOHN DOES I THROUGH X,
Defendants-Appellees.

JUDGMENT

Entered May 11, 1992

Before HOLLOWAY, SEYMOUR, ANDERSON, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah, and was submitted on the briefs at the direction of the court.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

APPENDIX H

U.S. Code § 636 1988

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section,[2] and

(4) the power to enter a sentence for a misdemeanor or infraction with the consent of the parties.

(b) (1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to in-

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[2] So in original. The comma probably should be a semicolon.

voluntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [3] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the pro-

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[3] So in original. Probably should be "post-trial".

visions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jursidiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the

magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's

right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause

why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such magistrate. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate, shall not apply to the recall of a retired magistrate under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate under this subsection or section 375 of this title unless such retired magistrate met such requirement upon appointment or reappointment as a magistrate under section 631.

(June 25, 1948, ch. 646, 62 Stat. 917; Oct. 17, 1968, Pub. L. 90-578, title I, § 101, 82 Stat. 1113; Mar. 1, 1972, Pub. L. 92-239, §§ 1, 2, 86 Stat. 47; Oct. 21, 1976, Pub. L. 94-577, § 1, 90 Stat. 2729; Oct. 28, 1977, Pub. L. 95-144, § 2, 91 Stat. 1220; Oct. 10, 1979, Pub. L. 96-82, § 2, 93 Stat. 643; Oct. 12, 1984, Pub. L. 98-473, title II, § 208, 98 Stat. 1986; Nov. 8, 1984, Pub. L. 98-620 title IV, § 402(29)(B), 98 Stat. 3359; Nov. 14, 1986, Pub. L. 99-651, title II, § 201(a)(2), 100 Stat. 3647; Nov. 15, 1988, Pub. L. 100-659, § 4(c), 102 Stat. 3918; Nov. 18, 1988, Pub. L. 100-690, title VII, § 7322, 102 Stat. 4467; Nov. 19, 1988, Pub. L. 100-702, title IV, § 404(b)(1), title X, § 1014, 102 Stat. 4651, 4669; Dec. 1, 1990, Pub. L. 101-650, title III, § 308(a), 104 Stat. 5112.)

U.S. Code § 636 1990 Supp.

§ 636. Jurisdiction, powers, and temporary assignment

[*See main edition for text of (a) and (b)*]

(c) Notwithstanding any provision of law to the contrary—

[*See main edition for text of (1)*]

[*See main edition for text of (3) to (7); (d) to (h)*]